Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

Marie-Thérèse Halim Assa'ad-Faltas, M.D., M.P.H.
versus
The United States Attorney General,
and the Secretary of Homeland Security.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

Questions of returning resident alien's status arise in many contexts. *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), answered: since "brief, casual and innocent" trip abroad does not meaningfully interrupt permanent residence, it is not a departure in law; and return therefrom is not a new "entry." Congress codified the *Fleuti* doctrine in the Immigration Reform and Control Act of 1986 (IRCA) despite then-Attorney General Meese's view that *Fleuti* is limited to permanent residents.

In the Fourth and Ninth Circuits' law and the Second and Tenth Circuits' *dicta*, *Fleuti* protects all lawful-but-not-yet-permanent residents; but the Eleventh Circuit in this case held (and the Seventh Circuit, citing it, implied) that *agency* is authorized to limit *Fleuti's* reach. The Third Circuit, citing this case, recently adopted agency's declaration of *Fleuti's* demise.

Petitioner's life (at medical risk from exclusion) now hinges on these respectfully presented questions:

1. Is regulation implementing benefit-conferring remedial statute permissible even if, for no articulated or possible administrative advantage, it operates to (a) foreclose the judicial review provided by statute; (b) contravene the Helsinki Accord and other treaties recognizing travel for family needs as a basic human right; and (c) mislead that statute's beneficiaries into forfeiting benefits?

2. Does the Constitution permit the Executive to overrule or ignore the Judiciary and create geographic disparity and confusion in immigration law by continuing to apply invalid regulation outside the Circuits that invalidated it?

Parties to the Case

Petitioner is Dr. Marie-Thérèse Halim Assa'ad-Faltas who was party to all cases below. Under Egypt's patronymic system, the names following her Christian name are not last names but are, respectively, the Christian names of her father, grandfather, and great-grandfather. Her correct formal appellation is "Dr. Marie." To avoid the confusion created by the lower tribunals' use (or misspelling) of her grandfather's or great-grand-father's Christian names, interchangeably as if they were her last name, she is referred to herein as "Petitioner."

Respondents below were the Immigration and Naturalization Service (INS) and the Board of Immigration Appeals (BIA), both lodged in the U.S. Department of Justice when the cases started. The Homeland Security Act replaced INS with two bureaus in the Department of Homeland Security. Therefore, both the Attorney General and the Secretary for Homeland Security are Respondents herein.

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Petition for a Writ of *Certiorari*

This Court is hereby respectfully petitioned for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

Opinions Below

The Court of Appeals' reported opinion, *Assaad v. U.S. Attorney General*, 332 F.3d 1321 (11th Cir. 2003);[1] and unreported decisions of the Board of Immigration Appeals (BIA), immigration judges (IJs), and Legalization Appeal Unit (LAU); are in Appendix Part I.

Jurisdiction

The Court of Appeals' opinion issued on 5 June 2003. A timely petition for rehearing was denied on 26 September 2003. By aggregate of orders dated 25 November and 18 December 2003 and 26 January 2004, the Honorable Justice KENNEDY kindly extended the time to file this petition to 23 February 2004.

Petitioner had timely sought the Fourth Circuit's[2] review of BIA's 27 August 2001 final order to exclude her and the Sixth Circuit's[3] review of BIA's 7 January 2002 denial of reconsideration.[4]

Respondents' motions to transfer were granted on 22 October 2001 and 19 June 2002.[5] The Eleventh Circuit consolidated the two cases transferred to it and found its jurisdiction under IIRIRA.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions and Treaties and Regulations Involved

The provisions of the Constitution, statutes, treaties, and regulations involved are in Appendix Part II.

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1 Other Article III courts' unreported opinions/orders which partly set the law of this case are printed in the Appendix as procedural background.

2 Except for medical residency in Illinois and Arkansas from July 1985 to June 1987, Petitioner lived in North Carolina from August 1979 to January 1992, and in South Carolina from 1992 till now.

3 The exclusion is based *solely* on her 28 October 1989 return to the U.S. via Port Huron, Michigan, after an innocent two-day trip to Canada.

4 She had first tried to return to U.S. District Court (D.S.C.), which had, on Respondents' *vigorously opposed* motion, dismissed WITHOUT PREJUDICE her 1993 challenge to statutes and regulations applied to exclude her.

5 (App. K) They had urged that, **because the last IJ to rule on Petitioner's case did so from Atlanta,** the Eleventh Circuit is the only venue under §309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, PL 104-208, 110 Stat. 3009, as amended ("IIRIRA") *(reprinted in 8 U.S.C.A. §1101 (historical notes))* (the transitional rules).

STATEMENT

I. THE RANGE OF REVIEW OFFERED BY THIS CASE

Annually, 476,641 people become lawful permanent residents (LPR) by adjustment of status in the U.S. in lieu of coming from abroad with immigrant visa.[6] Agency processes an adjustment application in months to years; but, by regulation, deems it abandoned if applicant goes abroad for business or family needs without an agency permit *misnamed* "**advance parole.**" The 212,754 aliens/year who return *with that permit* are branded "**unadmitted,**" subjected to exclusion, detention and denial of work permit, and denied administrative and/or judicial review if agency erroneously denies adjustment.

Petitioner is a quadrilingual Coptic Christian[7] physician (MD) and Master of Public Health (MPH) who first came in 1979 as a U.S.-selected-and-sponsored scholar. She faces indefinite avulsion from her entire family (all U.S. citizens or LPRs) and grave or fatal medical effects of agency-ordered exclusion *solely because* she went, *with agency permission*, to Canada for two days in 1989 to see a sick, since-deceased uncle and broke no law before, during or after her "brief, innocent and casual" trip abroad.

(A) Elementary Fairness

This conscience-shocker may be redressed by elementary fairness along any or all of these three important principles:

(A-1) Immigration agency must deliver what its regulation is fairly read to promise. Since 8 CFR § 245a.2(m)(1) provides:

> the alien ... can only be **readmitted** to the United States provided [her] departure was authorized under the Service's **advance parole** provisions [of] §212.5(f) of this chapter[,]

alien who uses "**advance parole**" is entitled to be **readmitted**, not branded "**unadmitted parolee**," subject to dreadful risks.

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[6] All annual figures herein are the FYs 1998-2002 five-year averages. Of the 1,064,318 new LPRs in FY 2001, only 411,059 were "new arrivals," but **653,259 were status adjustees.** *INS Statistical Yearbook, 2001.*

[7] Institutional discrimination against Coptic Christians, and violence by Islamic extremists against them, are documented in the Administrative Record (AR), *e.g.*, AR 244; and in *Nagi El Moraghi v. Ashcroft*, 331 F.3d 195 (1st Cir. 2003). Petitioner resisted INS' pressures on her to seek asylum because she believes that true Christians do not flee persecution and because her true reasons for wanting to live here are to be with her family and to better share her unique talents.

(A-2) Absent comity among U.S. Courts, Petitioner, who received "advance parole" in Charlotte, NC, in 1989, should have been judged by Fourth Circuit law controlling there and then, not by *new* 2003 law of the Eleventh Circuit, which got her case *solely because* the last IJ to rule on it holds office in Atlanta, Ga.

(A-3) A hearing must not be denied *solely because* dismissal of legally infirm charges was vacated. She should not have been excluded as if, on her 1989 return from Canada, she had been "an immigrant without visa" **without a hearing** for her response.[8]

But with facts so clean, inter-circuit conflicts so stark, issues so vital and pervasive, agency's defiance of the Judiciary so brazen, and human rights so basic, this case is a rare, ideal vehicle to explore restabilizing the law on these more enduring pillars:

(B-1) Benefits of Percolation Without Conflicts

U.S. Courts revisit administrative issues settled by coordinate courts only when agency non-acquiesces to the first rulings. Non-acquiescence denies non-parties equal protection of otherwise applicable judicial rulings and deprives the Judiciary, Congress and the President of national, statistically powerful, empirical comparison of the Article-III-court-ordered remedy against an agency practice/regulation which had sufficiently injured a party for a justiciable case to arise. This Court never upheld non-acquiescence; others find it unconstitutional. Its advocates cite *Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990) (**"grave doubt, ..., whether [Secretary] could appeal his own order"**) thus **"freezing the development of the law [at] the first final decision rendered on a particular legal issue."** *U.S. v. Mendoza*, 464 U.S. 154, 162 (1984). But *Agostini v. Felton*, 521 U.S. 203 (1997), shows a better way to unfreeze even this Court's law. And in immigration, the Homeland Security Act of 2002, PL 107-296, 116 Stat. 2315 (HSA), ended *Finkelstein*'s doubt. Immigration is now under a Secretary for Homeland Security, who oversees INS' successors, and an Attorney General, who oversees the Executive Office of Immigration Review (EOIR). One Cabinet-level officer may appeal from *another's* order.

8 She could have proven that *on 28 October 1989* (1) any needed visa had been *wrongly* withheld, (2) she was not an immigrant or was *statutorily* exempt from needing a visa and/or (3) she held a valid visa-equivalent. An IJ had terminated her exclusion as her return was not "entry." BIA vacated. Entry is a *sine qua non*, but not *per se*, ground for exclusion.

Now, agency aggrieved by a circuit's ruling may ask *that circuit* to change it under *Agostini* conditions any time *that agency,* having applied it nationwide, can *empirically* show its adverse effects.

(B-2) Border Security With Human Right to Travel

Under *Murray v. The Charming Betsy,* 2 Cranch 64, 118 (1802), and *National Labor Relations Board v. Catholic Bishops of Chicago,* 440 U.S. 490, 500 (1979), acts of Congress are construed consistently with the Constitution and "the Law of Nations." If Congress intends otherwise, **"such extraordinary intent ought to have been plainly expressed."** *Betsy,* at 2 Cranch 118. When the U.S. joins a treaty on human rights, Congress builds it into subsequently-enacted immigration statutes. The Preamble and Article 10, §1, of the International Covenant on Economic, Social and Cultural Rights, signed by President Carter in 1977, provide [with emphasis added]:

> The State Parties, ... [recognize] that *these rights derive from the* ***inherent dignity of the human person,*** ... [and] that the widest possible protection and assistance should be accorded to the family[—]the natural and fundamental unit of society.

The U.S. is also party to the Helsinki Accord, of which Article IV, Section 1(a) provides in relevant part [with emphasis added]:

> [T]he participating States will favorably consider ... allowing persons to enter or leave their territory temporarily, and on a regular basis if desired, in order to visit members of their families ... without distinction as to the country of origin or destination[.] The preparation and issue of ... [required] travel documents and visas will be effected within reasonable time limits; *cases of urgent necessity*—such as serious illness or death--*will be given priority.* * * * They confirm that the presentation of *an application concerning contacts on the basis of family ties* ***will not modify the rights*** *and obligations of the applicant or of members of his family.*

"Advance parole" (which does **not** require more rigorous inspection of alien carrying it) **needlessly** *"modifies"* her rights by equating her with pardoned *offender,* let back by grace of officials, not by right of personhood, and subsequently treating her, *for all legal purposes,* as if she never lived here. In no modern immigration statute did Congress intend to so degrade a *returning resident* alien's legal status in the U.S. *due solely to a trip abroad.*

The Framers secured freedom of travel by protecting privileges of those who return after exercising it.[9] Yet, in 2003, when national security demands uniformity, the Third, Seventh and Eleventh Circuits unsettled stable law by treating cross-border travel as a *tenuous* statutory benefit. The answer is a broad ruling by this Court that a neutral alien, residing in the U.S. *under color of any of its laws*, has a human right to return to the *same status* after a trip abroad that is, *at worst*, neutral to U.S. interests.

II. ROOTS AND DEVELOPMENTS OF RELEVANT LAW

In *The Federalist No. 42*, Madison shows that Article I, Section 8, Clause 4, ends geographic disparity in naturalization rules:

> In one state, residence for a short term confers all the rights of citizenship; in another, qualifications of greater importance are required[; ...] thus the law of one state [may be] rendered paramount to the law of another, within the jurisdiction of the other. [By] mere casualty, very serious embarrassments on this subject have been hitherto escaped. The new constitution has accordingly, with great propriety, made provision against them ... by authorizing the general government to establish an uniform rule of naturalization throughout the United States.

The Framers wanted laws uniform as written *and as applied;* hence **"faithfully"** in the "take Care" Clause. The Clause was so reported by the Committee of Style;[10] but the Framers' debates had focused on fairness to the diverse states and preventing a monarchy. So, **"faithfully"** must mean "consistently, at all times and places," *and* "execute the laws as passed by Congress, not as desired by the President's agents." Empowered to suggest and veto laws, the President may not suspend, alter or neglect any law Congress succeeds in enacting. And when a law is unclear to the Executive, "It is **emphatically the province and duty of the judicial department to say what the law is.**" *Marbury v. Madison*, 1 Cranch 137 (1803).

9 On 8-9 August 1787, the Framers changed **"a resident"** to **"an inhabitant"** in Article I, Sect. 2, Cl. 2, and Sect. 3, Cl. 3, so as to **"not exclude persons absent occasionally for a considerable time on public or private business."** Madison, *The Constitutional Convention*, Hunt edition.

10 Extant earlier drafts of the Clause read **"duly and faithfully."** **"Duly"** must have been struck as included in **"faithfully."** The Constitution and its 18th Century Amendments use only ten adverbs. **"Faithfully"** is used twice, but only to define how the Executive shall **"execute."**

The Constitution *initially* left *immigration* to the States, at least until 1808, a mistake causing, and redressed by, the Civil War. The Fourteenth Amendment, having *inter alia* returned power over *immigration* from the States to Congress, must be read to prohibit agency-or-court-created geographic disparity in immigration laws.

Until 1875, alien migration to the U.S. was unrestricted. The Act of 3 March 1875, 18 Stat. 477, barred convicts and prostitutes and relied on state and local officers to enforce it. The first general immigration statute was the Act of 3 August 1882, 22 Stat. 214. General revisions preceded the comprehensive Immigration and Nationality Act of 1952 (INA), PL 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §1101 *et seq.*) An Immigration and Naturalization Service (INS) was then created to fulfill relevant duties theretofore lodged in a Department of Labor (DOL). INS was often criticized by courts,[11] Congress, and the press.[12] HSA replaced INS with a Bureau of Citizenship and Immigration Services (BCIS) and a Bureau of Immigration and Customs Enforcement (BICE).

INA divides arriving aliens into immigrants (LPRs) or non-immigrant "visitors," subdivided (A-V) by purpose of visit.[13] Under prescribed terms, visitors may "adjust" from one visitor status to another or to LPR *in the U.S.*[14] For few aliens, this alternative to consular processing abroad is just convenient. For many, it is

11 Aliens are defenseless against INS bureaucrats' abuses or demands for bribes; *e.g., U.S. v. Kahan*, 415 U.S. 241 (1974). Chief Circuit Judge Posner noted in *Salameda v. INS*, 70 F.3d 447, 449 (7th Cir. 1995):

> The proceedings of [INS] are notorious for delay, and the opinions rendered by its judicial officers, including ... [BIA], often flunk minimum standards of adjudicative rationality. [citations] The lodging of this troubled Service in the Department of *Justice* of a nation that was built by immigrants and continues to be enriched by a flow of immigration is an irony ...

12 *The Portland Oregonian* won the 2000 Pulitzer for its reports on INS. The House voted to abolish INS in Spring 2002. Representatives then joked **"INS has had its visa revoked and been deported. INS meant 'Incompetent, Negligent Service' and 'Ignore National Security.'"**

13 Some are prelude to LPR status; *e.g.*, K (fiancé[e] of U.S. citizen or LPR), V (LPR's unmarried son or daughter awaiting immigrant visa); or may last for years; *e.g.*, J (exchange visitor), O (alien of extraordinary ability).

14 *Elkins v. Moreno*, 435 U.S. 647, 667 (1978), explains: **"Although adjustment of status is a matter of grace, not right, ... binding decision of the Board of Immigration Appeals states: '.... *In the absence of adverse factors, adjustment will be granted*, still as a matter of discretion.'"** [italics by the Court]

necessitated by the qualifier for LPR status.[15] For most, it is mandated by statutes.[16] Agency accepts adjustment application *only if* the alien has an *immediately* available visa (or is *exempt*) and medical and police clearance, and pays a fee.[17]

Adjustees (c. 500,000/year) **X** processing lag (c. 2 years) = *a million* aliens, in the U.S. any day in recent time, *fully* LPR-qualified but awaiting *processing*,[18] of whom 212,754/year need to go *briefly* abroad. At them, INS unleashed the "advance parole" chimera.

That device is traceable to *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), which began by asking if, absent trip abroad, alien was deportable:

> [W]e ... consider ... whether Fleuti's short visit to Mexico can ... be regarded as "a departure to a foreign port or place .... [that] was not intended," within the meaning of the exception to the term "entry" created by the statute. *** [W]hen an alien ... who has acquired a residence here steps across the border and ... back, *subjecting him to exclusion for a condition for which he could not have been deported had he remained in the country* [places] him at the mercy of [a] "sport of chance" and "meaningless and irrational hazards[.]" *** *Kwong Hai Chew v. Colding*, 344 U.S. 590, ... supports the general proposition that a *resident alien* who leaves this country is to be regarded as *retaining certain basic rights*. [*Id.*, at 452-3, 460, italics added]

Fleuti next consulted the Constitution and naturalization law to assess any just consequences Congress could and did impose on resident alien's cross-border travel; *id* at 459-62, emphasis added:

15 Employment-based immigrant may lose the visa-qualifying job while waiting abroad for consular processing. A visa-qualifying marriage requires the alien to cohabit with the U.S. citizen or LPR spouse.

16 Legalization, *infra*, and LIFE Act's §245(i), *infra*, require continuous presence in the U.S. from the date of passage of the Act until adjustment.

17 In 1994, §245(i) was added to INA, 8 U.S.C. §1255(i), to allow aliens present in the U.S., and otherwise eligible for adjustment of status but barred by past overstay or unauthorized employment, to overcome that bar by paying a $1,000 fee. In 2000-1, the LIFE Act briefly revived §245(i).

18 The Immigration Services and Infrastructure Improvements Act of 2000, PL 106-313, 114 Stat. 1263, enacted to **"eliminate the backlog and processing delays in immigration benefits adjudication,"** provides:

> [Sec. 202(b)] POLICY.—It is the sense of Congress that the processing of an immigration benefit application should be completed not later than 180 days after the initial filing of the application, except that a petition for a nonimmigrant visa under [INA §214(c)] should be processed not later than 30 days after the filing of the petition.

> Section 316 of [INA], ... provides that an alien who wishes to seek naturalization does not ... endanger the five years of "continuous residence" in this country ... until he remains outside the country for six month [or] damage his position by cumulative temporary absences unless they total over half of the five years preceding ... his petition for naturalization. This enlightened concept of what constitutes a meaningful interruption of the continuous residence which must support a petition for naturalization ... strengthens ... a belief that the exceptions to §101(a)(13) should ... protect resident aliens who are only **briefly** absent from the country.***
>
> In making such a **casual** trip the alien would seldom be aware that he was ... walking into a trap, *for the insignificance of a brief trip to Mexico or Canada bears little rational relation to the punitive consequences of subsequent excludability.****
>
> Congress ... has the power to exclude all ... undesirable aliens ... *but we do not think Congress intended to exclude aliens long resident in this country after lawful entry who have merely stepped across an international border and returned "in ...hours."****
>
> The more civilized application of immigration laws given recognition by Congress in §101(a)(13) and other provisions of [INA] protects the resident alien from unsuspected risks and unintended consequences of such a wholly **innocent** action.

In 1968, 8 CFR §254.2(a)(3) issued as **"permission"** for **"unintended or innocent and casual"** travel. In 1978, **"permission"** changed its name to **"parole"** to claim descent from 8 U.S.C. §1182(d)(5).[19] *Joshi v. District Director,* 720 F.2d 799, 801-803 (4th Cir.1983), disagreed: **"Advance parole is *not* a statutory procedure."**[20] But *Matter of Torres,* 19 I. & N. Dec. 371 (BIA 1986); and 8 CFR §245.2(a)(4)(ii)(1986)[21] announced BIA's and INS' **non-acquiescence** to *Joshi* and *Patel*.

[19] This sole parole provision of INA neither contemplates "advance" nor matches any of 8 CFR §236.4 (1983)'s language or purpose.

[20] Citing it, *Patel v. Landon,* 739 F.2d 1455, 1457 (9th Cir 1984), added: **"[Patel] was trapped into exclusion status when he was given parole[. This we] cannot condone."** INS' denial of status adjustment was then reviewable by EOIR in deportation, but not exclusion, hearings. Whether the hearing is deportation or exclusion also determined the availability of judicial review because Article III courts could not review INS' denial of adjustment but could only review EOIR's review of INS actions.

[21] It provides: **"No alien granted advance parole and inspected upon return shall be entitled to a deportation hearing."**

New "advance parole" litigation followed the Immigration Reform and Control Act of 1986, PL 99-603, 100 Stat. 3359 (IRCA).[22] IRCA created the Seasonal Agricultural Workers (SAW), 8 U.S.C. §1160, and Legalization, 8 U.S.C. §1255a, programs. Legalization covers "illegal entrants" (who came *illegally* before 1982) and "visa violators" (who came *legally* on status that lapsed by 1 January 1982 or whose "unlawful status was known to the Government as of such date.") IRCA is mandatory ("***shall*** **adjust**"); but INS mismanaged it, causing class actions where INS lost below and came to this Court. First, *Haitian Refugee Center v. Nelson*, 872 F.2d 1555, 1559 (11th Cir. 1989), described INS' bungling of IRCA applications thus:

> The worksheets of appellees[,] who were recommended for approval by the LO and were denied without explanation by the [Regional Processing Facility], were completely blank.

INS challenged district courts' jurisdiction to order creation of agency records on which to base judicial review of INS' denials of SAW status. *McNary v. Haitian Refugee Center*, 498 U.S. 479, 491, 496 (1991), held that IRCA allows collateral attacks:

> [T]he impact of a denial on the opportunity to obtain gainful employment is plainly sufficient to mandate constitutionally fair procedures. At no time ... have petitioners asserted a right to employ arbitrary procedures, or questioned their obligation to afford SAW ... applicants due process of law. Nor ... is there any dispute that the INS routinely and persistently violated the Constitution and statutes in processing SAW applications. * * * Congress legislates with knowledge of our basic rules of statutory construction, and given our well-settled presumption favoring interpretations of statutes that allow judicial review of administrative actions, [citations] coupled with the limited review provisions of §210(e), it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review.

Another class action arose because 8 U.S.C. §1255a(a)(3) provides:

> **(A) In general** – The alien must establish [continuous physical presence] in the United States since November 6, 1986.

[22] A one-time remedial program, IRCA cast a wide net toward *industrious* aliens. At 1986 U.S. Cong. & Ad. News 5723, the Administration wrote Congress:

> [T]he newly legalized population will be an asset to the States, consisting of productive, hard-working people[;] the legalized population will be contributing taxes to States and localities.

(B) Treatment of brief, casual, and innocent absences – An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual and innocent absences from the United States.

(C) **Admissions**– Nothing in this section shall be construed as authorizing [admission to] the United States in order to apply for adjustment of status under this section.

Purporting to implement it, 8 CFR §245a.2(l)(2), provides:

> A brief, casual and innocent absence means a departure authorized by the Service (advance parole) [after] May 1, 1987 of not more than (30) days for legitimate emergency or humanitarian purposes unless a further period ... has been granted ... or a departure was beyond the alien's control.

Catholic Social Services [CSS-I] v. Meese, 685 F. Supp. 1149, 1155-7, 1159 (E.D. Cal. 1988), invalidated 8 CFR §245a.2(l), reasoning:

> If [it] ... permit[s] all otherwise eligible aliens inside the United States as of May 1, 1987, to obtain legalization without consideration of absences from the United States between November 6, 1986 and May 1, 1987, the Attorney General has ... voided the continuous physical presence requirement during the application period. If ... an alien must establish that he has been continuously physically present in the U.S. since November 6, 1986, except for absences authorized by INS after May 1, 1987, then it reads the "brief, casual and innocent" absence exception out of the statute entirely during the preapplication period. Neither construction ... is consistent with the plain meaning of the statute [or] is a linguistically permissible interpretation of the statute so that deference is even possible. ***
>
> [T]he problem of getting undocumented aliens to come forward to participate in the program makes it highly unlikely that Congress intended to require such aliens to seek INS permission to leave the country prior to the time their legalization applications were filed. * * * Congress knew about the [advance parole] process and could have written similar language into section 245A(a)(3) if it had intended to impose such a condition on the "brief, casual and innocent" absence exception to the physical residence requirement. * * * [245A(a)(3)(C)] does not justify a regulation which ... nullifies

the "brief, casual and innocent" absence exception to the continuous physical presence requirement. * * * [T]he "brief, casual and innocent" doctrine is not limited to absences authorized by INS. * * *

The final regulation defining a "brief, casual and innocent" absence as one authorized by INS is invalid as inconsistent with the statutory scheme and hence is unenforceable.

Conceding that 8 CFR §245a.2(l) is invalid, INS challenged that court's extension of the application period. *Reno v. Catholic Social Services [CSS]*, 509 U.S. 43, 54-55 (1993), found:

Although the Associate Commissioner's decision is the final agency action[,] an adverse decision does not trigger deportation proceedings. On the contrary, because [IRCA] allows the INS to use information in a legalization application only to make a determination on the application, ... an alien whose appeal has been rejected by the [agency] stands (except for a latent right to judicial review of that rejection) in the same position he did before he applied: he is residing in the United States in unlawful status, but the Government has not found out about him yet. We call the right to judicial review "latent" because §1255a(f)(4)(A) allows judicial review of a denial of adjustment of status only on appeal of "an order of deportation." Hence, the alien must first either surrender to the INS for deportation,[16] or wait for the INS to catch him and commence a deportation proceeding, and then suffer a final adverse decision in that proceeding, before having an opportunity to challenge INS's denial of his application in court.

[fn]16 Although aliens have no explicit statutory right to force INS to commence a deportation proceeding, INS represent[s] that "any alien ... may secure review by surrendering for deportation at any INS district office."

The LIFE Act of 2000, 106 PL 553-Appendix B, §§1101-1104, 114 Stat. 2762A-142-49, and "LIFE Act Amendments," 106 PL 554-Appendix D, §§1501-1506, 114 Stat. 2763A-324-28, amended IRCA *inter alia* (with emphasis added) thus:

(C) CONTINUOUS PHYSICAL PRESENCE –

(i) IN GENERAL – The alien must establish that [he] was continuously physically present in the United States [from] November 6, 1986, [to] May 4, 1988, except that–

(I) an alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of this subparagraph by virtue of brief, casual, and innocent absences from the United States; and

(II) brief, casual, and innocent absences from the United States shall *not* be limited to absences with advance parole.

LIFE also codified extension of application period for "front-desked" aliens. *CSS-I* was settled on 23 January 2004 by consent order requiring adjustment of c. 300,000 class members' status by 2006; *i.e.,* 20 years late, after 6,000,000 person-years were lost.

More will be lost if the Eleventh Circuit's decision *sub judice* (that *Fleuti*, *CSS-I* and LIFE apply **only** for eligibility determinations, **"but not at the border"** for returning resident aliens) stands. Under such reasoning, INS excluded *prima facie* §1255a-eligible aliens returning *without* "advance parole" from a trip abroad during pendency of IRCA application (regardless of how "brief, innocent and casual" the trip was) and excluded Petitioner *after* her trip *was* found to have been "brief, innocent and casual," *solely because* she had traveled *with* "advance parole." The trip *per se*, with or without "advance parole," is thus punished in all cases.

IN SUM: INS punished every alien whose U.S. residence is lawful, albeit not yet administratively-labeled "permanent," *for exercising a basic human right to cross-border travel to see family,* unless the IJ who last ruled on his/her case did so from an office within the Second, Fourth, Ninth, or Tenth Circuit's jurisdiction.

The longest IRCA suit began in 1988 on behalf of alien students who had worked without permit, failed to carry a full course load, and/or failed to maintain address registration with INS before 1982, yet suffered IRCA denials under invalid INS processing rules. U.S. District Court (W.D. Wa.) certified three classes and issued injunctions. INS obtained a qualified stay pending appeal; *INS v. Legalization Assistance Project,* 510 U.S. 1301, 1306 (1993) (**"Neither CSS nor this stay prevents aliens from suing in their own right."**) After several appeal rounds, *Immigrant Assistance Project [IAP] v. INS,* 306 F.3d 842 (9th Cir. 2002), affirmed the district court's disposition and remanded. Petitioner is a class representative in the amended complaint filed on remand.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Petitioner graduated medical school With Honors in July 1977. In July 1979, after the Camp David Accord, the Fulbright Commission selected her, as one of Egypt's hundred brightest young graduate scholars, to launch a pilot (Phase-I) of the "Peace Scholarships."[23]

At age 26, her acceptance of the prestigious but spartan two-year graduate *non-medical* scholarship in the U.S. meant (1) separation from family; (2) deferral of (a) marriage, (b) medical career and (c) pursuit of faculty tenure in any Egyptian medical school; (4) foregoing likely offers from Europe or Japan, where she had briefly trained while a medical student; and (5) obtaining a study leave from her then-employer, Egypt's Health Ministry.[24]

To compliment the Peace Scholars (or conceal terms of their J-1 visas) the U.S. Consul in Cairo issued them *without* applications, fees or interviews. Petitioner had only to authorize AMIDEAST to take her Egyptian passport to the U.S. Consul for a visa stamp. It was returned to her with an embossed visa stamp and papers folded and stapled shut. She was admonished that opening them before arriving to the U.S. would void her visa. Only after an inspector opened her papers at Dulles Airport on 22 August 1979 and gave her the "alien's copy" did she learn that AID, J-1, and a **"two-year homestay requirement,"** 8 U.S.C. 1182(e), even exist.

Six months after enrolling at UNC-Chapel Hill for her MPH, she was hospitalized for iatrogenic paralysis for ten weeks, during which she dropped all her courses and failed to register her address, and after which she failed to timely renew her status or register her address. In response to that catastrophic delay, AID paid her stipend till 15 February 1982 and sponsored her J-1 status till 31 May 1982, and INS gave her a renewable grace period till 10 November 1982. But the courses and research she had chosen for her MPH were too extensive to finish before December 1982. So, her mother came to the U.S. in July 1982 to support her.

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23 Larger phases followed; but only the pilot was a degree program and was fully administered by the U.S. Agency for International Development (AID) by contract with the non-government non-profit American Educational Organization for the Middle East (AMIDEAST).

24 The Heath Ministry conditioned the study leave on her agreeing to refund *to Egypt* all sums *the U.S.* spent on her if she returns to Egypt without the new graduate degree.

But she had long lost what career chances she had in Egypt; and Egypt's Health Ministry ruled that her overstay of her study leave, while excused by her illness, merits termination of her employment by a Ministerial Decree retroactive to August 1981.

Considering that her recovery from the sequela of her 1980 hospitalization needs her own medical research into her condition, she had to revive her medical career but could work only in the U.S. She passed all required U.S. equivalency and licensure examinations, served satisfactory residencies in Pathology (technology-aided study of diseases) in Illinois and Arkansas, and since 1988, held plenary license to practice Medicine and Surgery in the U.S.

Meanwhile, her mother's talents had caused a U.S. employer, DOL and INS to certify her a skills-based immigrant. Petitioner's mother, father and the younger of her two siblings, the then-minor Manal, were admitted as LPRs in July 1984 and naturalized in 1990. In October 1984, and June 1990 and 1992, INS classified Petitioner as a high-preference family-based immigrant.

In May 1988, the Charlotte, NC, Legalization Office (LO) judged her *prima facie* IRCA-eligible under §1255a(a)(2)(B) as a visitor who never *meaningfully* interrupted her U.S. residence after her status lapsed in 1980-1. In June 1988, she filed application for status adjustment as unmarried daughter of an LPR. It was judged complete by the Charlotte INS office and held for processing.

But she came to the personal attention of the Officer-in-Charge there when defendants in INS-unrelated suit she prosecuted *pro se* (and later settled) took his deposition[25] in August 1988.

He then pulled her application out of line and threatened to **"deny/reject"** it unless she proves that §1182(e) does not apply to her or gets §1182(e) waived in the oppressively short span of 15 days. She responded by requesting the forms and a reasonable period to secure a waiver if one proved necessary. Instead, he arbitrarily denied her family-based application in October 1988 and then began sabotaging her IRCA application.[26]

In September 1989, she gave the Charlotte, NC, LO proof of illness of a since-deceased uncle in Canada. LO gave her a triplicate

[25] They also took, in her absence, the deposition of AMIDEAST's Vice-President, who testified that Petitioner would **not** have been told of the two-year homestay, and that AID's policy of issuing U.S.-funded scholars J-1 visas **"would never be shown to the applicant, ever."** (AR 715-18)

one-page one-sided form that identified her by her IRCA number, name and photo *inter alia*, and read ***in toto*** (with emphasis added):

> Presentation of the attached duplicate of this document will authorize a transportation line to accept the named bearer on board for travel to the United States **without liability** under section 273 of the Immigration and Nationality Act **for bringing an alien who does not have a visa.**
>
> Presentation of the original of this document prior to October 29, 1989 will authorize an immigration officer **at a *port of entry* in the United States** to permit the named bearer, whose photograph appears heron, **to *enter* the United States:** as an alien paroled pursuant to section 212(d)(5) of the Immigration and Nationality Act.
>
> Remarks: ISSUED FOR EMERGENCY REASONS
> PRIMA FACIE ELIGIBILITY UNDER I.R.C.A.
>
> S/ Bonnie M. Ford, XCH Charlotte, NC (Authorizing Office)
>
> Form I-512 (Rev. 10-1-82) Y

She drove to Canada on 27 October 1989, returned the next day, and presented at the border the form LO had given her. She was inspected and allowed into the U.S. *without detention.*

INS annually extended her card "to **reside** and work" in the U.S. till July 1992 (under her IRCA no. [A91158379]) and December 1993 (under A120900414) (AR 425). In January 1990, an adverse *interim* IRCA decision issued on *assumptions* that §1182(e) applies to her and that her status had not lapsed by 1982. She timely appealed to LAU, showing that the Ministerial Decree is equivalent to a NO-Objection letter and that her 1980 hospitalization breached her J-1 status and was then known to the Government (AID). LAU then directed her to file waiver application at her LO. She did on 2 April 1990, using a form LO gave her (AR 841) but heard nothing from LAU until 2003. In June 1990, she filed a new adjustment application as an unmarried daughter of a U.S. citizen. It was arbitrarily denied on 5 November 1991.[27]

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26 He also initiated *vexatious* deportation proceeding using a pretext of her failure to take time off her 1985-7 residency duties for the bureaucratic steps of visa extension and work authorization. Having timely applied for IRCA, she was *non-deportable*. In March 1990, IJ Auslander terminated the deportation. INS did not appeal. That rendered INS' charges of unauthorized work and overstay *res judicata*.

27 It was then, months before LAU adjudicated her IRCA application, that the I-121 issued. Far from allowing alien to stay in the U.S. to prosecute pending application, "advance parole" is revocable at INS' whim.

In June 1992, she filed her third family-based application in Charleston, SC. INS says it lost it despite having a log of it and copies of her receipts (AR 294). In August 1993, she received an I-122 addressed to a *detained* immigrant without visa. Dated 5 November 1991, it neither bore her IRCA number nor matched the facts of her two-day trip to Canada (AR 105). Her mother and she sued in U.S. District Court (D.S.C.) to enjoin INS to adjust her status instead of excluding her.[28] INS persuaded that court to *prudentially* abstain. (App. B) Abstention was affirmed in *Fares and Faltas, v. INS*, No. 94-1339, slip op. pp 5-6 (4th Cir. 1995) (App. C, 35a):

> Requiring Faltas to first renew her request for adjustment of status in front of an immigration judge (IJ) would not cause irreparable injury. Presenting the request to the IJ would not be futile. If the IJ grants [it], that would be an adequate remedy. [If he] denies [it, it] would be subject to judicial review in a habeas action challenging the exclusion order. *See Crespo-Gomez v. Richard*, 780 F.2d 932, 933-34 (11th Cir. 1986) (reviewing denial of discretionary relief incident to exclusion proceedings in habeas appeal).

INS wrote *ex parte* falsehoods to IJ De Bernardis, who spread them and froze her case until he was transferred (AR 403-413). On 13 December 1995, IJ Copeland, the only officer ever to hear evidence in this case, found no jurisdiction to adjust her status but terminated exclusion on these grounds (App. D):

> **FINDINGS OF THE [IJ]COURT**
>
> The Court finds that the applicant ... was an applicant for legalization under the IRCA Program when she departed the United States for Canada [and that her] trip to Canada was

[28] INA factors hardship to U.S. citizen or LPR parents of criminal and/or undocumented aliens in waiver of deportation; but U.S. citizen or LPR parents of alien scholars are excluded from §1182(e)'s waiver process.

Her U.S. citizen mother, whose three daughters are multilingual physicians, sought a constitutionally-rehabilitated waiver process to benefit both her first born (Petitioner) and her second daughter, Amal [a Phase-II Peace Scholar to whom §1182(e) applied]; but the district court prudentially abstained because *Petitioner* was in exclusion proceedings.

By 2002, Amal and her husband had become so renowned in Pediatrics as to earn waivers based on national-interest rather than the still-unavailable waiver based on the hardship to her U.S. citizen mother.

"Advance parole" thus interfered with both Petitioner's and her mother's rights to be heard in U.S. courts; and U.S. citizens similarly situated to this mother are still *irrationally* denied equal protection.

brief, casual and innocent, and that it was not meaningfully interruptive of whatever status, if any, she had in the United States in October of 1989.

The Court also finds that [she] was granted work authorization[,] that [it] was extended on [few] occasions, into calendar year 1992[. ... T]hat ... document was prepared, ... drafted, printed and issued by the [U.S.] Immigration and Naturalization Service[, and] ... prominently displays on its face words to the effect that the holder of that document is entitled to **"reside"** and work in the United States during the period that the card is, on its face, valid. ... [She] was improperly placed in exclusion proceedings in that, under the *Fleuti* Doctrine as noted by the 4th Circuit in... *Joshi v. District Director, Immigration and Naturalization Service*, 720 F.2d 799 (1983), [she] was entitled to re-enter the United States without sacrificing her right to remain in this country subject to deportation, rather than exclusion proceedings.

* * * [These] exclusion proceedings should be terminated on the *Joshi-Fleuti* rationale [and on] an alternative basis...

[She held] an employment authorization document which, on its face, states that the holder is entitled to **reside** and work in the United States for the period that the document is valid. * * * [INS] extended her employment authorization into calendar year 1992, well past the time when [she] was issued the I-122 that initiated these exclusion proceedings. .... [INS] place[s] words on documents issued to aliens which are known to be relied upon, not only by the aliens themselves but by their employers, ... [and] would not place words on such documents that it did not intend to give full force and effect.

By ... extending that work authorization, knowing that the card is worded as it is, the Service must have undeniably intended and in fact, actually extended the period of legal residence in the United States. ... [T]he I-122 was improper when issued, or was subsequently rendered null and void by ... an action of an Immigration Official ...

She returned to District Court; but INS successfully urged more abstention pending *INS'* appeal. After BIA vacated IJ Copeland's decision, IJ Rast, ***without a hearing***, held Petitioner excludable as an "immigrant without immigrant visa." (App. E, F)

She asked him to consider her applications for adjustment of status as directed by the Fourth Circuit, *supra*; but he held the Fourth Circuit powerless to give him jurisdiction to do so. (AR 165, App. H). BIA affirmed. (App I, J) She sought judicial review.

In the December 2002 oral argument before the Court of Appeals, Respondents conceded that §1182(e) was *the only bar* to adjustment of her status but claimed she had never filed for waiver. Her post-argument brief proved from the AR that she *had* filed but §1182(e) *does not apply* to her *ab initio* due to lack of notice and is unconstitutional Government compulsion of speech. Respondents then produced a fax dated 17 February 1992, titled as LAU's denial of her IRCA appeal. (App. L) It proved that LO had not sent her waiver form to LAU or LAU ignored it. To debunk the pretext LAU had used in that 1992 denial (first revealed to her in 2003), Egypt's NO-Objection letter was sent via required diplomatic channels. With that, upon the State Department's recommendation, BCIS issued her a §1182(e) waiver in September 2003.

Advised of those developments, the Court of Appeals, at opinion fn 27, (26a) found no jurisdiction to consider the potentially-dispositive §1182(e) issues. INS had thus treated Petitioner **"as if she had never lived here at all"** by giving her "advance parole" then revoking it *arbitrarily* in November 1991; but due to INS' errors, she was denied judicial review of those very errors.

Meanwhile, Petitioner's father died and is buried in Ohio; Amal's household became LPRs; Manal's family and Ophthalmology practice in Ohio grew; and a blood-pressure-raising tumor grew in Petitioner's body, making air flight a *quasi* death sentence for her. Yet, citing the exclusion order, Respondents refuse to reopen any of her applications, despite availability of §245(i).

IN SUM: *Solely because* she exercised her basic human right to briefly visit her ill uncle abroad while INS *mislabeled* her travel paper "advance parole," rather than "permission to return," Petitioner, who had been invited here to "exchange" knowledge, was ***kept since 1994 without work permit.*** She who, but for INS' **16 years** of mishandling her applications, would long have been a U.S. citizen now faces death by deportation or an equally cruel sentence of inability to visit her father's grave.

REASONS TO GRANT THE WRIT

I. To Resolve Fully-developed Inter-circuit Conflicts

A. Conflicts Over the *Fleuti* Doctrine

Two unrelated aliens traveled separately abroad for family needs after having established *prima facie* eligibility for adjustment to "lawful temporary resident" under 8 U.S.C. §1255a (IRCA Legalization) but before final *agency* denial of each application. Each alien later suffered a final exclusion order based on the fact, *not nature*, of the trip abroad, and went to Article III court.

The alien before the Ninth Circuit had **not** sought travel pre-approval but asked his court to review INS' denial of his IRCA application. That court *circuitously* reached simple fairness (if INS construed itself authorized to let *prima facie* IRCA eligible aliens go abroad, it must readmit them). This prevents exclusion of returning *innocent* IRCA applicants and preserves the judicial review of agency denial available in judicial review of deportation, not exclusion, order. It held him **not** excludable *if* his trip was "brief, innocent and casual." It declined to review INS' denial of his IRCA application *at that stage;* but its ruling freed him to concede deportability per *CSS*, 509 U.S 54-55, *supra*, and seek adjustment as relief from deportation, or, if denied that, obtain judicial review of INS' denial of his IRCA application in judicial review of a final order to deport him. That was *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270 (9th Cir.1996), *rehearing and rehearing en banc denied*, 109 F.3d 551 (1997).

The alien before the Eleventh Circuit had obtained, and obeyed all parameters of, INS pre-approval. An IJ had *found* her trip "brief, innocent and casual." Respondents never challenged his findings of fact. The Court of Appeals held *the very INS approval "not a valid travel document"* and, on that *sole* basis, declined to review INS' denial of her IRCA status; yet, at its opinion fn 18, (17a) saw **"nothing harsh"** in all that. This is Petitioner's case. (App. A)

The Eleventh Circuit knew it was destabilizing the law because *Joshi* and *Patel, supra*, had clearly treated *Fleuti* as not limited to LPRs, because other circuits had noted that Congress extended *Fleuti* to IRCA aliens, and because other circuits and *this Court* had found that mere filing of a serious IRCA application restores the alien to lawful, though not permanent, status.

When *Fleuti* was decided, only LPRs could lawfully reside as aliens in the U.S. But the IRCA Congress recognized aliens **"Permanently Residing in the United States Under Color of Law"**[29] (PRUCOL), 1986 U.S. Cong.&Ad. News 5718, and heard and *overruled* then-Attorney General Meese's view of *Fleuti*; *id.* at 5720:

> The Administration also believes that the provisions relating to "brief, casual and innocent" absences from the United States will be extremely difficult to administer. Application of this standard is not supported by *Rosenberg v. Fleuti*, 374 U.S. 446 (1963). *Fleuti* applies only to lawful permanent resident aliens, not aliens illegally in the United States. We suggest that absences of a specific period of time, i.e., no more than fifteen days in the aggregate, from the date chosen for legalization, constitute the qualifying limit.

According to *Aguilera-Medina v. INS;* 137 F.3d 1401, 1403-4, nn 5, 6, (9th Cir. 1998), this **"only confirms that Congress was aware that it was extending substantial benefits to temporary residents, yet nonetheless did so."** Hence a SAW alien did **not "enter"** when he returned from a trip to Mexico **"to attend his child's baptism."**

In *dictum* in *Baca-Prieto v. Guigni,* 95 F.3d 1006, 1011, n 5, (1996), a non-IRCA case, the Tenth Circuit noted that

> Congress has imported *Fleuti's* notion of a "brief, casual, and innocent" absence into the areas of suspension of deportation, 8 U.S.C. §1254(b)(2), and legalization, 8 U.S.C. 1255a(a)(3)(B), so that the period of "continuous physical presence" required for such benefits (extended to illegal aliens) is not affected by brief trips out of the country. *See Mendoza*, 16 F.3d at 337 & nn. 3, 4. We agree with the Ninth Circuit ....

Mendoza v. INS, 16 F.3d 335, 337-8, n 4 (9th Cir. 1994), had noted:

> Congress limited the *Fleuti* exception to lawful permanent residents, 8 U.S.C. § 1101(a)(13), aliens seeking suspension of deportation, 8 U.S.C. §1254(b)(2), and aliens seeking legalization, 8 U.S.C. §1255a(a)(3)(B).

And *U.S. v. Hernandez,* 913 F.2d 1506, 1513 (10th Cir. 1990), reasoned:

> Because aliens ... applying for legalization of their immigration status may not be deported, 8 U.S.C. §§1160(d) & 1255a(e), they are not unlawfully in the United States.

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29 **"PRUCOLS [include] refugees, asylees, persons granted withholding of deportation, registrants under Section 249, aliens paroled into the United States, and persons granted deferred action."** 1986 U.S. Cong. & Ad. News 5718.

Also, *Castellon-Contreras v. INS*, 45 F.3d 149, 154 (7th Cir. 1995), and *Ortega de Robles v. INS*, 58 F.3d 1355, 1358-61 (9th Cir. 1995), held that lawful residence begins upon filing IRCA application.

Article III courts were almost unanimous[30] in invalidating INS policy of excluding aliens with established *prima facie* IRCA eligibility returning from brief, casual and innocent trip abroad. *Campos v. Smith*, 791 F.Supp. 262 (W.D. Wash. 1991), and *Navaro-Aispura v. INS*, 842 F.Supp. 1225 (N.D.Cal. 1993), *affirmed* 53 F.3d 233 (9th Cir. 1995), reinstated the excluded aliens. *De Oliveira v. INS*, 873 F.Supp. 338 (D.C. Cal. 1994), and *Fernandes v. McElroy*, 920 F. Supp. 428 (S.D.N.Y. 1996), *vacated on other grounds*, 138 F.3d 27 (2nd Cir. 1998),[31] thoroughly studied and rejected INS' arguments and practices. *Espinoza-Gutierrez, supra*, struck the final blow.[32]

Fleuti and its progeny consider "entry" as surrogate for the *real* question of **all** removal proceedings (however named): should *this* alien *remain* in the U.S.? Immigration agents work to prevent illegal *entry* of aliens only to prevent the *presence* in the U.S. of unauthorized aliens. The instant/act of entry is of no *per se* import. A static *in vacuo* definition of "entry" serves no purpose.

The Eleventh Circuit's disquisition on the Fourth and Ninth Circuits' supposed errors ignored the real question: even if Petitioner *were* entering, why should she not have been allowed to enter? Its answer, if any, recites the charge of excludability: she lacked valid entry document. **But if "advance parole" is not "valid entry document," what is it?** And why did INS send Petitioner on her way to Canada with a document INS deems invalid for her return? She needed INS permission, not to leave, but to return.

Despite, or because of, its misplaced focus, the Seventh and Third Circuits followed the Eleventh in equating returning resident alien, LPR or PRUCOL, with applicant for initial entry.

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30 *Kasbati v. District Director of INS*, 805 F.Supp. 619 N.D. Ill. 1992), implicitly overruled by *CSS*, is the only exception predating this case.

31 The Second Circuit did **not** disturb the district court's invalidation of the practice but remanded for determination of alien's IRCA status.

32 Those aliens had been *physically* detained at the border then released on parole—unlike Petitioner, who was inspected and admitted unconditionally at Port Huron in October 1989. The idea of her ever having been "detained" appears **only** in a document which INS admitted at the 13 December 1995 hearing before IJ Copeland to be incorrect. (AR 617)

Samirah v. O'Connell, 335 F.3d 545, 547-8 (7th Cir. 2003), reversed the district court's ruling that:

> [INS] cannot short-circuit the rights of an alien who has long lived in the United States by revoking his parole and then treating him as if he had never lived here at all.

Finally, *Tineo v. Ashcroft*, 350 F.3d 382 (3rd Cir. 2003), killed *Fleuti* when an LPR, excluded due to waivable offenses, invoked it:

> The ... issue ... is whether the specific provision of the prior statute and the common law doctrine of *Fleuti* survived the comprehensive amendments to the immigration laws enacted in ... IIRIRA, ... we hold that the doctrine of an "innocent, casual and brief" departure ... is inconsistent with the wholesale amendment to the relevant statutory scheme enacted in the IIRIRA.

Constitutionally-based doctrines of this Court cannot in effect be overruled by legislative act; *Dickerson v. U.S.*, 530 U.S. 428 (2000). *Fleuti* had consulted the Constitution to formulate a judicial gloss to be applied to one statute to save *another* from constitutional scrutiny. Respect for human rights is ingrained in the Constitution. And Article VI, Section 2, gives supremacy to treaties "made under the authority of the United States." These are "areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Montana v. U.S.*, 440 U.S. 146, 163 (1979).

Cases reading *Fleuti* as limited to LPRs (or unavailable even for LPRs), depending on the statute at hand, produced inhuman results. *Fleuti* can, and is now needed to shed its statutory garb and don a durable, human rights cloak: *returning* alien makes an "entry" only if (s)he was not entitled to remain in the U.S. on the day (s)he left it on a trip abroad. The Framers and Helsinki accept no less.[33]

B. Conflicts Over the *Moser* Doctrine

Moser v. U.S., 341 U.S. 41, 47 (1951), held "Petitioner did not knowingly and intelligently waive his rights. ... [N]othing less than an intelligent waiver is required by elementary fairness."

33 Sensitivity to human rights has so evolved that the European Court of Human Rights ruled that the state may not embark on deportation, even of a criminal alien, without regard to the privacy, home, and family life of settled immigrants. Please see; *e.g.*, *Beldjoudi v France*, 234 Eur CT HR (ser A) (1992); *Moustaquim v Belgium*, 193 Eur CT HR (ser A) (1991); *Berrehab v Netherlands*, 138 Eur CT HR (ser A) (1988). Please see also *Maria v. McElroy*, 68 F.Supp.2d 206 (E.D.N.Y.1999); and *Mojica v. Reno*, 970 F.Supp. 130 (E.D.N.Y. 1977).

Without estopping the Government, *Moser* thus avoided unfairness and was sensibly followed in *Podea v. Acheson*, 179 F.2d 306 (2nd Cir. 1950); *Corneil-Rodriguez v. INS*, 532 F.2d 301 (2nd Cir. 1976); and *Molina v. Sewell*, 983 F.2d 676 (5th Cir. 1993); *inter alia*.

Advance parole's harsh sequela preclude sane alien's **"knowing and intelligent"** acceptance. Courts absolved aliens from consequences of having gone abroad upon INS' misleading/incomplete disclosure; *e.g. Joshi*, *Patel*, and *Navaro-Aispura*, *supra*.

Suddenly, *Dimenski v. INS*, 275 F.3d 574, 578-9 (7th Cir. 2000), criticized *Navaro-Aispura*, casting it as a ruling that INS must give aliens **"legal advice,"** asking *sarcastically* **"Just what good would that have done him?"** and ignoring an easy answer: *he could have decided not to go abroad*. **"Elementary considerations of fairness dictate that individuals have an opportunity to know what the law is and to conform their conduct accordingly."** *Landgraf v. USI Film Products*. 511 U.S. 244, 265 (1994).

Following *Dimenski*, *Balogun v. Attorney General*, 303 F.3d 1303, 1312 (11th Cir. 2002), ends with **"Balogun might have been much better off had he not demonstrated his familial piety by traveling to his mother's funeral in Nigeria."** And citing its *Balogun*, the Eleventh Circuit in this case (24a-25a) summarily announced:

> INS is under no duty, constitutional or otherwise, to provide aliens with legal advice on the effects of parole. Moreover, parole has a well-established legal meaning [—] ***that the alien is allowed into the country but remains constructively at the border, seeking admission and subject to exclusion proceedings.

The **"legal meaning"** of "*advance* parole" where and when Petitioner accepted it from INS was the Fourth Circuit's *Joshi*, *supra*, ruling that applicant for status adjustment, returning with "*advance* parole," is **not** deemed paroled under 8 U.S.C. §1182(d). And here, another statute, 8 U.S.C. §1255a(i), issued a mandate:

> Beginning [on a date certain], the Attorney General .... ***shall* broadly disseminate information respecting** the benefits which aliens may receive under this section and the ***requirements to obtain such benefits.*** [emphasis added]

Information mandated by Congress must *ipso facto* be complete and accurate. Even if elementary fairness did not entitle **all**

aliens to accurate information (**not** "legal advice") from INS, IRCA aliens *are so entitled by statute*. The Eleventh Circuit acknowledged intrinsic **"tension"** in 8CFR §245a.2(m)(1)'s "the alien can only[34] be **readmitted** to the [U.S.] *provided* [her] departure was authorized under [INS'] **advance parole** provision." (22a-23a)

Said **"tension"** is resolved by *Joshi's* conclusion that **"parole"** in ***"advance* parole"** has the same *name*, but not the same *legal effect* of 8 U.S.C. §1182(d). But the Eleventh Circuit's fn 26 disagreed with *Joshi*, thus imposing its law on a resident in the Fourth Circuit's jurisdiction. This is precisely the result Madison deplored.

The circuits on the wrong side of the split sound oblivious to the human suffering they caused. Although Mr. Balogun and Mr. Tineo had crimes in their past, they were both rehabilitated, and, absent their trip abroad, could have had deportation waived. A lost sheep, when found, and a prodigal son, when he returns, are sources of great joy. But the Balogun U.S. citizen children will grow up without a daddy *because* he went to their grandmother's funeral. Likewise with the Tineos and Dimenskis.

The most shocking indifference of all is the Eleventh Circuit's in Petitioner's case ("we see nothing harsh ..."). Under *IAP, supra*, her IRCA application had clearly been *erroneously denied*. Yet, *solely because* of "advance parole" she was denied judicial review of that denial and kept without work permit long enough for a less grounded physician to lose skills. She may die if forced to fly. If she arrives intact, she will live alone among Egyptians suspicious of one who lived half her life in the U.S. **Nothing harsh?**

Even for aliens granted LPR status under IRCA or other statutes, parole is *not innocuous*. An alien who was excludable at entry is deportable thereafter. *Fleuti, supra*. And, while awaiting adjustment, "parolee" status may preclude "domicile" for state purposes. *Elkins, supra*. From renewing a driver's license to collecting lottery winnings, a PRUCOL is barred if called "parolee." This is precisely the result Helsinki forbids.

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[34] Grammatical placement of **"only"** between **"can"** and **"be readmitted"** means she **cannot even be *legally* paroled at all**, *only* readmitted.

Since **"provided"** means **"only if,"** the drafters could not have meant to place **"only"** before **"provided,"** or it would have read like **"only only if."** Alien need not assume that INS writes its regulations in bad English.

II. Because the Court of Appeals' Decision is in Conflict With Decisions of This Court

A. On the Primacy of Judicial Review of Agency Actions

In construing IRCA to permit exclusion, and consequent loss of judicial review, due *solely* to a *Fleuti*-type trip, the Eleventh Circuit ignored this Court's teachings that statutes are construed to permit judicial review unless Congress *expressly* bars it.

Legalization provisions are best studied in light of analogous SAW provisions. Since SAW does **not** require *continuous* presence,[35] long, non-casual trips abroad **do *not* defeat** SAW eligibility. As such trips are not protected by *Fleuti*, §1160(d)(2)(A) protects non-frivolous SAW applicants from *deportation **and** exclusion* pending **"final determination on the application."** And since an otherwise excludable alien *may remain* SAW eligible, §1160(e)(3)(A) provides judicial review of agency denial of SAW status **"in the judicial review of an order of *exclusion* or *deportation*."**

But under §1255a's continuous physical presence condition, trips abroad (*unless* "brief, innocent and casual") **defeat** §1255a eligibility. So, §1255a(e)(2)(A) protects *prima facie* applicants *from deportation*[36] *but **not** exclusion* pending **"final determination on the application"** *because* saving IRCA ***ineligible*** alien from exclusion *serves no purpose*. Under *Landon v. Plasencia*, 459 U.S. 21 (1982), if a returning *LPR's* trip abroad is *reasonably* suspected to have violated INA, the issue may be adjudicated in an exclusion hearing with due process for her to rebut all charges against her.

In a *Plasencia*-type hearing for a *prima facie* §1255a-eligible alien returning from a trip abroad, one of three results may obtain:

1. IJ finds the trip was "brief, innocent and casual" and terminates exclusion. That alien does not *need* IRCA's protection from *non-existent* risk of exclusion.

35 SAWs need only have **"resided in the United States, and performed seasonal agricultural services in the United States for at least 90 man-days, during the 12-month period ending on May 1, 1986."** SAWs may apply abroad or be admitted in order to apply, and may choose to come to the U.S. for the 90-day agricultural season only.

36 **"The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of immigration laws."** *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984). Timely *prima facie* §1255 application ends any prior immigration violation effected by undocumented presence in the U.S. Thus, deportation would serve no purpose.

2. IJ *incorrectly* finds the trip was **not** "brief, innocent and casual" and orders alien excluded. Judicial review *of the exclusion order itself* vacates it. That alien's §1255a application, and judicial review if agency denies application, remain unencumbered.
3. IJ *correctly* finds the trip abroad was **not** "brief, innocent and casual" and the exclusion order is judicially affirmed. That alien's §1255a application must fail for breach of continuous presence. If agency denies it on some *other erroneous* basis, such denial is *harmless*, and judicial review of it would be *merely advisory* and contrary to *INS v. Bagamasbad;* 429 U.S. 24 (1976).

This is why 1255a(f)(4)(A) allows judicial review of INS denial of §1255a status in judicial review of deportation order only.

Congress denied judicial review *only* where it cannot save alien who forfeited IRCA eligibility. But the Eleventh Circuit's approval of INS' use of "advance parole" denies judicial review *where needed most:* for alien who *maintained* continuous presence but was *incorrectly* denied Legalization on some other *incorrect* basis.

But even if 8 U.S.C. §1255a(a)(3)(B) *were* limited to eligibility for benefits and had only borrowed the *Fleuti* factors to determine IRCA eligibility, as the Eleventh Circuit said at 14a, two questions still invalidate advance parole:

1. Did Congress intend *prima facie* §1255a eligible alien to forfeit judicial review of INS' denial of her application due **solely** to the same "brief, casual and innocent absence" that did not defeat her eligibility for adjustment of status *ab initio*?

Since Congress legislates knowing that the Judiciary favors judicial review of agency actions, *McNary, supra,* the answer must be NO. Then, "advance parole," which causes forfeiture of judicial review of Legalization denial due *solely* to a "brief, casual and innocent" trip abroad, must be invalid as contrary to Congress' intent to provide judicial review for eligible aliens.

2. Does "**final determination on the application ... *in accordance with this section***" in §1255a(e)(2) include judicial review?

McNary and *CSS, supra,* answer YES. Otherwise, aliens who surrender for deportation to obtain judicial review of denial get deported *before* judicial review occurs. Advance parole *unreasonably* keeps them in *permanent* vacuum—ineligible for judicial review (unavailable in exclusion) yet not deportable until judicial review, which makes a denial **"final"** *per §(e)(2),* occurs.

The Eleventh Circuit's result would have been fair if INS never *erroneously* denied IRCA cases. History teaches the opposite. INS erroneous use of advance parole shielded itself from judicial review.

B. On Which Law to Apply

"Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward." *U.S. v. Estate of Donnelly*, 397 U.S. 286, 294 (1970). The law of the transferor court applies to transferred cases. *Van Dusen v. Barrack*, 376 U.S. 612 (1964). And *res judicata* operates against the Government in the unique context of **"a comprehensive adjudication of [] rights intended to settle once and for all [what] each of the litigants is entitled to."** *Nevada v. U.S.* 463 U.S. 110 (1983).

All three factors obtain. Petitioner's cases were transferred to the Eleventh Circuit from the Fourth Circuit, where she lives, and the Sixth Circuit, where she had crossed the border back from Canada. The Ninth Circuit is where *CSS-I* adjudicated **"once and for all"** the validity of the "advance parole" regulation. But the Eleventh Circuit made its own *new* law, creating *unnecessary* conflict.

In 1979, Petitioner accepted a scholarship from the *United States* of America, not from the *Conflicting Circuits* of America

III. Because the Issues Are Time-Sensitive and It Would Be Inequitable to Wait for Another Case

Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 10 (1942), noted:

> If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made.

Absent directions from this Court that the Circuits should not conflict on immigration law, Petitioner waited seven years to exhaust so-called "administrative remedies" as the Fourth Circuit directed her. But IJ Rast refused to reopen any of her denied applications; and IIRIRA arguably changed Petitioner's venue to the Eleventh Circuit. The latter construed the statute in conflict with the Fourth Circuit's law and in such a manner as to preclude judicial review. Waiting for another case to arise would be **"particularly inequitable."** *Agostini, supra*, at 521 U.S. 240.

Conclusion

As Congress must legislate constitutionally, the President must execute constitutionally. The one constitutional condition for execution of the laws is that it be done **"faithfully."**

Congress' power to enact, and the President's duty to execute, cross-border-travel laws derive from the need for, and are constitutionally exerted only insofar as they achieve, uniformity of rules as applied **"throughout the United States."** A federal regulation invalid in Oregon and Virginia but enforced in Georgia and Illinois is not a law being **"faithfully executed."**

Order finds no refuge in a jurisprudence of conflict. The writ should be granted.

Respectfully submitted

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Counsel for Petitioner

23 February 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 01-16153 and 02-13474
INS Docket No. A23-524-000

MARIE THERESE HALIM ASSA'AD, **Petitioner,**
versus
UNITED STATES ATTORNEY GENERAL,
IMMIGRATION AND NATURALIZATION SERVICE, **Respondent.**

Petitions for Review of Final Orders
of the Board of Immigration Appeals
(June 5, 2003)

Before ANDERSON, BIRCH and BARKETT, Circuit Judges.
ANDERSON, Circuit Judge:

This case comes to us on petition for review of an order of exclusion by the Immigration and Naturalization Service ("INS"). Petitioner, Marie Therese Halim Assa'ad-Faltas ("Faltas"), argues that she was improperly placed in exclusion proceedings rather than deportation proceedings. While Faltas had an application for legalization pending under §245A(a) of the Immigration and Nationality Act, 8 U.S.C. §1255a(a),[1] she departed the United States with advance parole from the INS. Following her return, Faltas's legalization application was denied, her parole status revoked, and exclusion proceedings against her commenced. Faltas argues that her return to the United States following a brief departure while her legalization application was pending did not constitute an "entry" and did not interrupt her status or deprive her of the right to deportation proceedings, rather than exclusion proceedings.

I. BACKGROUND

A. *Factual Background*

Faltas is a native and citizen of Egypt. She entered the United States in 1979 as an exchange visitor.[2] Although her authorized stay expired in May of 1982, Faltas remained in the country until September of 1983, when she departed for Egypt. Three months later, she re-entered the United States as a temporary visitor for pleasure authorized to stay for six months.[3] Faltas remained in the country for nearly six years.

1 Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §1101 *et seq.*) ("INA" or "Act").

2 INA §101(a)(15)(J), 8 U.S.C. §1101(a)(15)(J).

3 8 U.S.C. §1101(a)(15)(B).

On June 22, 1988, Faltas filed an application for adjustment of status under INA §245, 8 U.S.C. §1255. She applied to have her status adjusted to that of an alien lawfully admitted for permanent residence as the unmarried daughter of a lawful permanent resident. This application was denied on October 27, 1988, for working without employment authorization[4] and for failure to satisfy the admissibility requirement of INA §245(a).[5] Having been admitted as an exchange visitor in 1979, Faltas was ineligible for an immigrant visa or for permanent residence status until she either resided in Egypt for at least two years following her stay in the United States or obtained a waiver of this requirement.[6]

On May 4, 1988, Faltas filed an application for legalization under INA §245A(a), 8 U.S.C. §1255a(a). This application was denied on January 18, 1990. The denial of her application was affirmed on administrative appeal on February 17, 1992. On September 29, 1989, while Faltas's legalization application was pending, Faltas was granted advance authorization for parole. Faltas departed the United States for Canada on October 27, 1989, returning on October 29.

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[4] An alien is ineligible for adjustment under §245 if she "continues in or accepts unauthorized employment prior to filing an application. .. or... is in unlawful immigration status on the date of filing the application. ..." INA §245(c), 8 U.S.C. §1255(c) (1989).

5 The status of an alien who was inspected and admitted or paroled into the United States... may be adjusted by the Attorney General... to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.
INA §245(a), 8 U.S.C. §1255(a) (2002).

6 No person admitted under section 101(a)(15)(J) [the exchange visitor provision]... shall be eligible to apply for an immigrant visa, or for permanent residence...until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: *Provided*... [t]hat... the Attorney General may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.
INA §212(e), 8 U.S.C. §1182(e).

In June of 1992, Faltas filed another application for adjustment of status under §245 as the unmarried daughter of a United States citizen, her mother having naturalized. The INS has no record of this application, apparently having lost it.

B. *Procedural History*

On November 5, 1991, the INS commenced exclusion proceedings against Faltas. She was charged with being excludable at the time she returned from her trip to Canada for lack of valid travel and entry documents. *See* former INA §212(a)(20), 8 U.S.C. §1182(a)(20) (1989).[7] The immigration judge ("IJ") terminated the exclusion proceedings on December 13, 1995, finding that Faltas's 1989 departure was brief, casual, and innocent. Relying on *Joshi v. INS*, 720 F.2d 799 (4th Cir. 1983), the IJ concluded that Faltas was entitled to deportation proceedings. The IJ also concluded that the employment authorization extended to Faltas constituted a *de facto* extension of her parole status. On December 20, 1996, the Board of Immigration Appeals ("BIA" or "Board") vacated the termination order. The BIA held that the regulations relied upon in *Joshi* pertained to applicants for adjustment of status and, regardless, that those regulations were superseded by subsequent amendment. The BIA also held that work authorization does not constitute an extension of parole status.

On remand, the IJ found Faltas excludable under INA §212(a)(7)(A)(i)(I).[8] The only relief from exclusion Faltas sought was based on her earlier applications for adjustment of status and legalization. The IJ concluded that he did not have jurisdiction to review the denials of Faltas's legalization and adjustment applications and ordered her exclusion on March 24, 1998. The BIA affirmed on August 27, 2001, and denied an application for reconsideration on January 7, 2002.

Faltas appeals the order of exclusion and the denial of reconsideration. She argues that the BIA erred in treating her as an alien seeking admission on October 29, 1989, and subjecting her to exclusion, rather than deportation, proceedings.

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[7] This ground is now found at INA §§ 212(a)(7), 8 U.S.C. §1182(a)(7).

[8] "[A]ny immigrant at the time of application for admission—who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act ... is excludable." INA §212(a)(7)(A)(i)(I) (1996).

II. STANDARD OF REVIEW

Because the exclusion proceedings against Faltas were commenced before April 1, 1997, and the final exclusion order was entered more than thirty days after September 30, 1996, our jurisdiction is governed by the transitional rules found in §309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, as amended ("IIRIRA") *(reprinted in 8 U.S.C.A. §1101 (historical notes))*. *See Al Najjar v. Ashcroft*, 257 F.3d 1262, 1276-77 (11th Cir.), *reh'g, en banc, denied*, 275 F.3d 1085 (2001). Under the IIRIRA transitional rules, we apply the provisions of former INA §106, 8 U.S.C. §1105a (1996), except for subsection (b) of that section (providing for habeas corpus review of exclusion orders), as well as INA §242(g), 8 U.S.C. §1252(g) (exclusive jurisdiction). *See* IIRIRA §§306(c)(1), 309(c)(4); *Al Najjar*, at 1277 n. 4.

Our review is based on the administrative record. We will uphold findings of fact if they are "supported by reasonable, substantial, and probative evidence on the record considered as a whole." INA §106(a)(4), 8 U.S.C. §1105a(a)(4) (1996); *Al Najjar*, 257 F.3d at 1283-84. We review questions of law *de novo*, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493, 111 S.Ct. 888, 897 (1991), with appropriate deference to the BIA's reasonable interpretation of the Act. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424, 119 S.Ct. 1439, 1445 (1999). We will defer to the BIA's construction of the Act "if the statute is silent or ambiguous with respect to the specific issue before [us]" and the BIA's interpretation "is based on a permissible construction of the statute." *Id.* (quotations and citations omitted). We defer to the INS's interpretation of its own regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 911 (1997) (quotation and citation omitted).

III. REGULATORY OVERVIEW

A. *Parole*

Before IIRIRA took effect, the procedure by which an alien was removed from the United States turned on the physical location of the alien.[9] Aliens physically present in the United States were subject to deportation proceedings. *See, e.g.*, former INA §241(a), 8 U.S.C. §1251(a) (1996) (providing grounds for deporting

[9] The substantial differences between deportation and exclusion proceedings are noted in *Landon v. Plasencia*, 459 U.S. 21, 25-27, 103 S.Ct. 32 (1982).

"[a]ny alien in the United States") Aliens arriving at the border were subject to exclusion proceedings. *See, e.g.*, former INA §212(a), 8 U.S.C. §1182(a) (1996) (providing grounds for excluding aliens "from admission into the United States").[10]

An exception to this geography-based system was parole. Congress has granted the Attorney General the discretion to

> parole into the United States temporarily ... any alien applying for admission to the United States, but such parole shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

INA §212(d)(5)(A), 8 U.S.C. §1182(d)(5)(A) (2002). The Attorney General has established regulations delegating and implementing this grant of discretion. *See* 8 C.F.R. §212.5. In addition to establishing various criteria for granting parole to arriving aliens, §212.5 allows the INS to grant advance authorization for parole to an alien who has not yet, but will, travel to the United States without a visa. 8 C.F.R. §212.5(f). Commonly called "advance parole," this administrative device is described by the BIA as

> a mechanism by which a district director can, as a humanitarian measure, advise an alien who is in this country, but who knows or fears that he will be inadmissible if he leaves and tries to return, that he can leave with assurance that he will be paroled back into the United States upon return ....

In re G-A-C-, 22 I. & N. Dec. 83, 88, 1988 WL 39460 (BIA 1998) (*en banc*). When the conditions under which parole is granted expire or parole is otherwise revoked, the paroled alien is subject to exclusion proceedings. INA §212(d)(5)(A), 8 U.S.C. §212(d)(5)(A) ("parole shall not be regarded as admission of the alien"); 8 C.F.R. .212.5(e)(2) (upon termination of parole, the alien "shall be restored to the status that he or she had at the time of parole");

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10 The distinction now turns on status rather than location. All aliens are subject to removal proceedings, INA §240, 8 U.S.C. §1229a, but an alien in the United States who has been admitted is subject to deportability grounds, see INA §237(a), 8 U.S.C. §1227(a), while an alien who has not, regardless of his or her location, is subject to inadmissibility grounds, INA §212(a), 8 U.S.C. §1182(a).

Sale v. Haitian Ctrs. Council, 509 U.S. 155, 159 (1993) ("Aliens arriving at the border, or those who are temporarily paroled into the country, are subject to an exclusion hearing..."); *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958); *Jean v. Nelson*, 727 F.2d 957, 969 (11th Cir. 1984) (*en banc*), *aff'd*, 472 U.S. 846 (1985) (Parolees "can claim no greater rights or privileges under our laws than any other group of aliens who have been stopped at the border."); *Matter of Torres*, 19 I. & N. Dec. 371, 373, 1986 WL 67717 (BIA 1986) ("It is well settled that when an alien is paroled into the United States pursuant to section 212(d)(5) of the Act ... he does not gain the additional protections prescribed for deportation proceedings.")

B. *Legalization*

Faltas applied for legalization under INA §245A, 8 U.S.C. §1255a, enacted as part of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) ("IRCA"). IRCA was "a major statutory response to the vast tide of illegal immigration that had produced a 'shadow population' of literally millions of undocumented aliens in the United States." *McNary*, 498 U.S. at 481, 111 S.Ct. at 890. IRCA provided immigration amnesty for certain classes of unlawful residents, coupled with stiffened immigration enforcement. *Id.* at 481-83, 111 S.Ct. at 891. INA §245A(a) is one of these amnesty programs. It requires the Attorney General to adjust the status of an applicant to that of an alien lawfully admitted for temporary residence if the alien meets four requirements. These requirements are timely application, continuous unlawful residence, continuous physical presence, and admissibility as an immigrant. INA §245A(b) provides for the later adjustment of the alien's status to that of an alien lawfully admitted for permanent residence.

To encourage unlawful residents to apply for legalization, applications are confidential and information provided in a legalization application cannot be used as the basis for deportation proceedings. INA §245A(c)(4), (c)(5). Until "a final determination on [a legalization] application has been made," an applicant who has demonstrated *prima facie* eligibility for legalization cannot be deported, §245A(e)(2)(A), and is entitled to employment authorization, §245A(e)(2)(B).

The immigration status of an eligible applicant will be adjusted

to that of an alien lawfully admitted for temporary residence. INA §245A(a) ("The Attorney General *shall* adjust the status of an [eligible] alien ....") (emphasis added). A temporary resident is entitled to apply for permanent resident status under §245A(b)(1); is authorized to travel temporarily abroad under §245A(b)(3)(A); and is entitled to work authorization under §245A(b)(3)(B). Temporary residents obtain immigration benefits for their immediate families, as well; any spouse and unmarried children of the alien are protected from deportation on certain grounds, and may also obtain work authorization. *See* §301 of the Immigration Act of 1990 ("1990 Act"), Pub. L. No. 101-649, 104 Stat. 4978, 5029 (1990). A limited number of immigrant visas were also made available for these immediate family member; *see* §112 of the 1990 Act.

The immigration status of a successful applicant under §245A(b)(1) will be further adjusted to that of a lawful permanent resident. INA §245A(b)(1) ("The Attorney General *shall* adjust the status of any [eligible] alien" to that of a lawful permanent resident) (emphasis added). These aliens, who have twice demonstrated eligibility for the amnesty provisions extended by IRCA, are afforded the most protected status under the immigration laws, and may eventually be eligible for naturalization. *See* INA §316; *see also Kim v. Ziglar,* 276 F.3d 523, 528 (9th Cir. 2001) (noting that the benefits of lawful permanent residence include the right to work, without limitation, in the United States and to reside permanently in the country). Many grounds of exclusion (now inadmissibility) and deportation (now removability) are waivable only for lawful permanent residents or for the relatives of citizens and lawful permanent residents. *See generally* INA §§ 212(a) (grounds of inadmissibility), 237(a) (grounds of removability). Until 1996, lawful permanent residents with seven consecutive years of domicile returning from a voluntary departure could be readmitted even if excludable under most grounds of the Act, though this provision was repealed by IIRIRA. *See* former INA §212(c), 8 U.S.C. §1182(c) (repealed September 6, 1996). The INS can waive travel document requirements for lawful permanent residents returning from a temporary absence. *See* INA §211(b); 8 C.F.R. §211.4.

INA §245A(f)(3) requires the Attorney General to establish "a single level of administrative appellate review" of denials of appli-

cations for legalization. Administrative appeal is made to the Administrative Appeals Unit ("AAU"). 8 C.F.R. §245a.2(p). Immigration courts do not have jurisdiction to review the denial of an application for legalization. *In re Singh*, 21 I. & N. Dec. 427, 433 (BIA 1996) *(en banc)*. Limited judicial review of a denial is provided in INA §245A(f)(4)(A).[11] Judicial review is only allowed in the course of reviewing a deportation order. There is no provision for judicial review of a denied application in reviewing an exclusion order. *See Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1278 (9th Cir. 1996).

C. *The Fleuti Doctrine*

In the pre-IIRIRA era, important immigration provisions were keyed to an alien's "entry." Entry was defined as

> any coming of an alien into the United States ... except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for purposes of the immigration laws if ... his departure ... was not intended or reasonably to be expected by him ....

See former INA §101(a)(13), 8 U.S.C. §1101(a)(13) (1996). An alien's entry had consequences for the procedures used to remove the alien from the country and on the substantive grounds of deportability forming the basis of a removal. *See, e.g.*, former INA §241, 8 U.S.C. §1251 (1996), subparagraphs (a)(1)(A) (alien deportable if excludable at time of entry) and (a)(1)(B) (alien deportable if entered without inspection).

The Supreme Court construed the intent exception to the definition of entry in *Rosenberg v. Fleuti*, 374 U.S. 449, 83 S.Ct. 1804 (1963). Fleuti, a permanent resident alien, visited Mexico for a couple of hours. Following his return, the INS initiated deportation proceedings against him on the ground that he was deportable by reason of having been excludable at the time of his entry.[12] The Court held that this deportability ground did not apply, because Fleuti did not "enter" upon his return from Mexico. An intentional departure was construed as requiring "an intent to depart in a manner which can be regarded as meaningfully

11 "There shall be judicial review of such a denial only in the judicial review of an order of deportation under [former] section 106 [8 U.S.C. §1105a (1996)]." INA §245A(f)(4)(A), 8 U.S.C. §1255a(f)(4)(A).

12 Former INA §241(a)(1), 8 U.S.C. §1251(a)(1) (1956). The excludability ground was being "affected with psychopathic personality." See former INA §212(a)(4), 8 U.S.C. §1182(a)(4) (1956). This ground of excludability was not an independent ground of deportability.

interruptive of the alien's permanent residence." *Id.* at 462, 83 S.Ct. at 1812. The Court held that "an innocent, casual, and brief excursion by a resident alien beyond this country's borders may not have been 'intended' as a departure." *Id.* Return from such an excursion would not be an "entry."

IV. DISCUSSION

Faltas admits that an alien paroled into the United States is generally subject to exclusion proceedings when parole is revoked. She contends, however, that, whether or not she obtained advance parole, return to the United States after a "brief, casual, and innocent departure" while a legalization application is pending does not constitute an "entry" under former INA §101(a)(13). She relies on the *Fleuti* doctrine, which she contends is codified in INA §245A(a)(3)(B).

A. *Legalization Applicants and the Fleuti Doctrine*

Faltas argues that INA §245A(a)(3)(B) codifies the *Fleuti* doctrine for legalization applicants. Because the IJ found that her trip to Canada was "brief, casual and innocent," she contends that she did not "enter" the United States on October 29, 1989, and therefore was not subject to exclusion proceedings. *See Plasencia*, 459 U.S. at 28, 103 S.Ct. at 327 ("only 'entering' aliens are subject to exclusion"). Faltas relies heavily on the decision of our sister Circuit in *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270 (9th Cir. 1996). That court held that §245A(a)(3)(B) is ambiguous with respect to its effect on the "entry" of legalization applicants *Espinoza-Gutierrez*, 94 F.3d at 1275-76, but that the INS has reasonably interpreted the statute as modifying "entry." *Id.* at 1276.

1. The Statute

The first question we ask in construing this statute is whether "the statute is silent or ambiguous with respect to the specific issue." *Aguirre-Aguirre*, 526 U.S. at 424. The specific issue is whether Congress created an intent exception to the entry definition for legalization applicants. When construing the meaning of a statute, we begin with the language Congress has chosen and assume that the words used are intended to carry their ordinary meaning. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). When Congress uses language with a well-known legal meaning, however, we generally presume that it was aware of and intended the statute to incorporate that understood meaning. *Cf. Lorillard v. Pons*, 434 U.S. 575, 583 (1978); *Morissette v. United States*, 342 U.S. 246, 263 (1952).

(a) Plain Language

The statute allowing certain classes of unlawfully present aliens to adjust to temporary resident status is framed in terms of eligibility. *See* INA §245A(a) (an alien's status shall be adjusted "if the alien meets the following requirements:"). The four eligibility requirements are: (1) timely application, (2) continuous unlawful residence since November 6, 1982, (3) continuous physical presence since November 6, 1986, and (4) admissibility as an immigrant. The third requirement, the continuous physical presence requirement, requires the alien to "establish that the alien has been continuously physically present in the United States since November 6, 1986." §245A(a)(3)(A).[13]

Subparagraph (a)(3)(B) allows for an exception to the requirement: "[a]n alien shall not be considered to have failed to maintain continuous physical presence in the United States for the purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States." The plain language of this subparagraph expressly limits the effect of the exception to the eligibility requirement of subparagraph (a)(3)(A).[14] The applicant "shall not be considered to have failed to *maintain continuous physical presence* in the United States *for purposes of subparagraph (A)*" because of a brief, casual, and innocent absence. (Emphasis added)

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13 (A) In general. The alien must establish that the alien has been continuously physically present since November 6, 1986.

(B) Treatment of brief, casual, and innocent absences. An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States.

(C) Admissions. Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection.

INA §245A(a)(3).

14 Indeed, if the statutory language in §245A(a)(3)(B) does not limit the application of the *Fleuti* factors to eligibility requirements, it is difficult to imagine how Congress could have so limited them. One way to emphasize this point is to assume that the chosen language is ambiguous, then attempt to draft statutory language that would be unambiguous. For example, the statute could say, "for purposes of subparagraph (a) *and for no other purpose*," or "for purposes of subparagraph (a) *but not section 101(a)(13)*." This would be even clearer, but the added language only emphasizes a restriction already present. A reasonable reader would understand these additional limitations to be redundant. This indicates that the chosen statutory language is unambiguous.

The statute speaks only in terms of eligibility for legalization, and makes no reference to entry.

In §245A(b)(3)(A), Congress addressed the issue of travel abroad by applicants for legalization who have successfully completed the legalization process under §245A(a) and have already attained lawful temporary resident status.[15] That subparagraph directs the Attorney General to devise regulations allowing a legalized alien to return from travel abroad during his or her period of temporary residence under certain circumstances, namely, "after such brief and casual trips abroad as reflect an intention on the part of the alien to adjust to lawful permanent status ...." This subparagraph is also incorporated as part of the eligibility requirements for adjustment to lawful permanent resident status under §245A(b)(1)(B) (continuous residence requirement). *See* §245A(b)(1)(B)(ii) (referring to subparagraph (b)(3)(A))

So, like subparagraph (a)(3)(B),[16] subparagraph (b)(3)(A) addresses the effect of certain absences on eligibility for adjustment of status. Unlike subparagraph (a)(3)(B), however, subparagraph (b)(3)(A) expressly addresses authorization for travel abroad, or, more accurately, authorization for the INS to allow the alien to return after an absence. This express authorization for travel abroad and return for lawful temporary residents, and the absence of similar authorization for unlawfully present aliens who have merely applied for legalization, is a significant indication that Congress intended to bestow travel privileges only on lawful temporary residents. *Cf. Brown v. Gardner,* 513 U.S. 115, 120 (1994); *Cen-*

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15 INA §245A(b)(3) provides, in relevant part:

> Authorized travel and employment during temporary residence. During the period an alien is in lawful temporary resident status granted under subsection (a) -- (A) Authorization for travel abroad. The Attorney General shall, in accordance with regulations, permit the alien to return to the United States after such brief and casual trips abroad as reflect an intention on the part of the alien to adjust to lawful permanent resident status under paragraph (1) and after brief temporary trips abroad occasioned by a family obligation involving an occurrence such as the illness of death of a close relative or other family need.

16 The implementing regulations are found in 8 C.F.R. §245a.2(m)(2). The INS considers relevant the duration of the absence (30 days or less); the aggregate duration of absences (90 days or less following approval of legalization application); whether the departure was under deportation proceedings; and whether the alien possesses temporary residence card, presents him- or herself for inspection, and is otherwise admissible. Such an alien "may be admitted to the United States on return."

tral Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 184 (1994) (where Congress demonstrates awareness of an issue by expressly addressing it in one provision, silence on the issue in a similar provision is presumed to be intentional); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotation and citation omitted)

Thus, we believe that the exception for "brief, casual, and innocent absences" in §245A(a)(3)(B) is expressly limited to the continuous physical presence eligibility requirement. It does not affect the generally applicable definition of what constitutes an "entry" into the United States under former INA §101(a)(13). We reject Faltas's argument that her return to the United States following her brief absence was not an "entry."

(b) *Espinoza-Gutierrez*

Faltas's argument relies upon the Ninth Circuit case, *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270 (9th Cir. 1996). Consistent with the position advanced by Faltas, the Ninth Circuit held that a legalization applicant who returns from a brief, casual, and innocent trip abroad does not effect an "entry" upon returning to the United States, and is not subject to exclusion proceedings upon his or her arrival. Although the Ninth Circuit acknowledged that subparagraph (a)(3)(B) applies "[o]n its face ... only [to] the continuous physical presence requirement," *id.* at 1274, and although it acknowledged that only successful legalization applicants, *i.e.*, only lawful temporary residents, were expressly authorized to travel abroad and return, *id.* at 1275 (quoting §245A(b)(3)(A)), the *Espinoza-Gutierrez* court nevertheless held that the statute was ambiguous, relying primarily on its conclusion that the phrase "brief, casual, and innocent absences" indicated an intent to apply the *Fleuti* doctrine to legalization applicants, or, in the language of *Espinoza-Gutierrez*, an intent that subparagraph (a)(3)(B) would "operate as a border-crossing mechanism," and "apply at the border." *Id.* ("Historically, this language [from *Fleuti*] has been viewed as a border-crossing mechanism.") Having determined that the statute was ambiguous with regard to the scope

of subparagraph (a)(3)(B), the court construed INS regulations as interpreting the provision as a border-crossing mechanism, or as applying "to legalization applicants stopped at the border." *Id.* at 1271. Having concluded that the INS construed subparagraph (a)(3)(B) as applying the *Fleuti* doctrine to legalization applicants stopped at the border, the court then held that INS regulations requiring advance parole authorization for brief, casual, and innocent absences were invalid, *id.* at 1277, because they were inconsistent with "the *Fleuti* doctrine's purpose to circumvent entry procedures when aliens have not intended to disrupt their United States residency." *Id.*

For the reasons that follow, we respectfully disagree with the reasoning of the Ninth Circuit in *Espinoza-Gutierrez*. First, we do not believe that *Espinoza-Gutierrez* correctly read the Supreme Court decision in *Fleuti*. In this regard, it is important to look at the precise holding of *Fleuti*. The Court was construing the statutory definition of "entry" in former INA §101(a)(13). That definition was, for most aliens, very strict: an entry was "*any* coming of an alien into the United States." (Emphasis added.) Congress provided a limited exception, applicable only to lawful permanent residents:

> *[E]xcept* that an alien having a *lawful permanent residence* in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves... that his departure ... was not intended or reasonably to be expected by him... or was not voluntary.

Former INA §101(a)(13), 8 U.S.C. §1101(a)(13) (amended by IIRIRA) (emphasis added).[17] Specifically, the Supreme Court was concerned

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[17] For convenience, that definition is again set forth:

> The term "entry" means any coming of an alien into the United States ... whether voluntary or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure ... was not intended or reasonably to be expected by him ... : *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

This is the same entry definition applicable at the time of Faltas's return from Canada.

with the construction of the phrase, "[a] departure ... not intended" by the departing alien. The Court did not cut an exception to the entry doctrine from whole cloth; the intent exception to the entry doctrine was provided by statute. The exception, expressly relating to the definition of "entry" and expressly limited to lawful permanent residents, was construed to include an absence made without "intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." *Fleuti*, 374 U.S. at 462. "[A]n innocent, casual, and brief excursion by a resident alien" might not have been so intended. *Id.* The generally applicable definition of entry, as any coming into the United States, was left without exception.

The incorporation of the *Fleuti* factors into INA §245A(a)(3)(B) (and we agree that these factors were incorporated) does not imply that the application of those factors will have the same result (*i.e.*, a modification of the entry doctrine) in a statutory provision expressly limited to legalization eligibility as the application of those factors in an entirely different statutory provision, which did address the "entry" concept and which was expressly limited to the entry of lawful permanent residents. To conclude otherwise is to equate the factors involved in an inquiry with the purpose of the inquiry. The *Fleuti* Court proposed those factors for the purpose of determining whether a lawful permanent resident effects an entry under §101(a)(13); Congress borrowed those factors in §245A(a)(3)(B) for the purpose of determining whether a legalization applicant remains eligible for legalization.

Second, we respectfully believe that, in addition to over-reading *Fleuti*, *Espinoza-Gutierrez* under-estimates the degree to which the statutory structure sheds light on Congressional intent. As discussed above, we believe that to interpret subparagraph (a)(3)(B) as applying to entry as well as to eligibility is inconsistent with the plain language of the statute, which expressly limits the applicability of the *Fleuti* factors to the eligibility requirement of continuous physical presence. We also believe that to interpret subparagraph (a)(3)(B) as extending the intent exception to the entry doctrine to legalization applicants would be inconsistent with the general structure of §245A, which addresses eligibility for adjustment of status separately from the exten-

sion of immigration benefits, and which extends escalating immigration benefits to aliens who are able to demonstrate satisfaction of increasingly restrictive eligibility requirements.

The provisions of §245A specifically applicable to applicants for adjustment to temporary resident status are subsections (a) and (e). Subsection (a) addresses eligibility for adjustment to temporary resident status, while subsection (e) addresses immigration benefits for those applicants. The benefits extended are work authorization and protection from deportation; travel authorization is not one of the benefits extended in this subsection. See INA §245A(e).

The provision of §245A specifically applicable to applicants for adjustment to permanent resident status (*i.e.*, aliens who have successfully attained temporary resident status under subsection (a)) is subsection (b). Subsection (b) is subdivided into paragraph (1), addressing eligibility for adjustment to permanent resident status; paragraph (2), addressing revocation of that status for certain reasons; and paragraph (3), addressing immigration benefits for temporary residents. Those benefits are temporary work authorization, subparagraph (b)(3)(B), and travel authorization, subparagraph (b)(3)(A).

So, §245A addresses applicants for adjustment to temporary residents and applicants for adjustment to permanent residence in parallel fashion by setting out eligibility requirements separately from immigration benefits. The one time the statute makes the same provision applicable to both immigration benefits and eligibility, it does so explicitly. *See* §245A(b)(1)(B)(ii) (travel authorized under subparagraph (b)(3)(A) will not disrupt the alien's continuous residence). Construing subparagraph (a)(3)(B) as an implicit modification of the entry doctrine, as Faltas urges, would be inconsistent with an organizational structure that separates eligibility requirements from immigration benefits, inconsistent with the explicit treatment of travel authorization for lawful temporary residents, and, as discussed below, inconsistent with the statute's extension of increasingly generous immigration benefits as an alien satisfies progressively restrictive eligibility requirements.

Section 245A provides escalating immigration benefits to aliens who are able to demonstrate satisfaction of increas-

ingly restrictive eligibility requirements. For example, not all applicants for adjustment to temporary resident status are entitled to work authorization and a stay of deportation; only applicants who demonstrate *prima facie* eligibility for legalization under subsection (a). *See* §245A(e). These benefits terminate when a final determination on the alien's legalization application is made; aliens unable to demonstrate eligibility are deportable, while aliens who can demonstrate eligibility have their status adjusted. Successful applicants can now apply for lawful permanent resident status under subsection (b). The eligibility requirements for this adjustment are timely application between the nineteenth and thirty-third months following adjustment to temporary resident status; continuous residence following adjustment to temporary resident status; admissibility as an immigrant; and demonstration of basic citizenship skills. *See* §245A(b)(1).

During the period of lawful temporary residence, the alien is entitled to work authorization and travel authorization. The travel authorization is limited, however; temporary residents are permitted to return, "in accordance with regulations," only after "such brief and casual trips abroad as reflect an intention on the part of the alien to adjust to lawful permanent resident status" and after trips taken for emergent family reasons. *See* §245(b)(3)(A). The applicable regulations require the returning temporary resident to stay within per-absence and aggregate time limitations, to present a temporary residence card, to present for inspection, and to demonstrate admissibility.

If subparagraph (a)(3)(B) created an entry exception for applicants for adjustment to temporary residence, applicants returning from brief, casual, and innocent absences would not face per-absence or aggregate time limits; would not need travel documents, would not need to present themselves for inspection, and would not need to demonstrate admissibility, because they would not be "entering." Their return would not have to be "in accordance with regulations." Applicants for temporary resident status would have a broader right of travel than would temporary residents. This benefit would be extended without even the requirement that the applicant demonstrate *prima facie* eligibility for adjustment, which is not a limitation found in subparagraph (a)(3)(B) (as it is in subsection (e)).

Interpreting subparagraph (a)(3)(B) as limited to eligibility for legalization, however, avoids these inconsistencies. Under our interpretation, the organizational structure of §245A remains consistent in the way it addresses applicants for adjustment to temporary resident status and applicants for adjustment to permanent resident status. Each category of applicants must demonstrate certain eligibility requirements, set forth in one part of the statute, and are entitled to certain immigration benefits, addressed separately by the statute. When a provision is applicable to both eligibility requirements and immigration benefits, the statute says so explicitly. Restricting subparagraph (a)(3)(B) to eligibility is also consistent with the statute's provision for escalating immigration benefits.

Mere applicants for adjustment to temporary resident status are, like other unlawfully present aliens, entitled to no benefits. Applicants demonstrating *prima facie* eligibility for immigration amnesty are entitled to work authorization and a stay of deportation pending adjudication of their applications. Successful applicants are entitled to work authorization and have limited permission to travel abroad while they pursue adjustment to permanent resident status. In sum, when travel abroad and return has been expressly authorized for lawful temporary residents not only as an eligibility requirement, but also as a travel benefit, and when that benefit has not been bestowed on unlawfully present aliens who have merely applied for legalization, it would be inconsistent with this organizational structure to nonetheless imply a travel benefit (indeed, an even more generous travel benefit) for unlawfully present aliens.

We see nothing unreasonable or harsh[18] in this more limited construction of the "brief, casual, and innocent absences" exception. Under the reasonable regulations of the INS, a legalization applicant returning from a brief, casual, and innocent trip abroad will be paroled into the country, thus permitting the completion of the legalization process. *See* 8 C.F.R. §245a.2(l)(2), (m)(1).

18 Before an alien unlawfully residing in the United States applies for legalization, it is clear that the alien's return following any absence would be an "entry." We see nothing harsh about continuing this treatment for such aliens pending resolution of their applications, and for such aliens who, as here, have completed the legalization process but were unable to demonstrate their membership in the class of aliens to whom Congress intended to extend immigration amnesty.

Section 245A(a)(3)(B) fully serves its purpose by ensuring that "brief, casual, and innocent absences" do not interrupt the applicant's continuous physical presence, and thus do not defeat the applicant's pursuit of legalization. With respect to all successful applicants for legalization, their brief, casual and innocent trips abroad will have no adverse consequences; even if the alien were subject to exclusion proceedings upon his or her return, the successful applicant's status will be adjusted and the slate wiped clean. Thus, with respect to all aliens in the class targeted by Congress in the immigration amnesty program, the congressional purpose is fully accomplished.[19]

We do not think it implausible that Congress intended a legalization applicant's "brief, casual, and innocent" absence to affect only the question of continuous physical presence and not "entry." A very natural, indeed the most plausible, reading of the statute is that Congress merely intended the phrase as a shorthand for evaluating whether there was a meaningful interruption in the alien's continuous physical presence. *Fleuti* itself, and its progeny, considered the contours of what constitutes a departure that is meaningfully interruptive of the alien's status. For example, courts have considered how long an absence may be considered brief, *Itzcovitz v. Selective Service Local Bd.*, 447 F.2d 838, 839-94 (2d Cir. 1971) (permanent resident's three-week trip to Tel Aviv for job training was brief); what purposes behind a departure are innocent, *Laredo-Miranda v. INS*, 555 F.2d 1242, 1246 (5th Cir. 1977) (though permanent resident's trip to Mexico was for innocent purpose initially, it became meaningfully interruptive when he aided illegal entrants on his return); and whether the hardship to the alien or the alien's

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19 The case of an eligible alien whom the INS refused to permit to return to the United States or refused to permit an opportunity to continue to pursue a pending legalization application might present a different question, and would give us pause. *See, e.g., Kasbati v. District Director*, 805 F.Supp. 619, 623 n.12 (N.D.Ill. 1991) (noting this problem). See also *Fernandes v. McElroy*, 920 F.Supp. 428 (S.D.N.Y. 1996) (returning alien's legalization application denied at his exclusion hearing); *De Oliveira v. INS*, 873 F.Supp. 338 (C.D.Cal. 1994) (legalization applicant was unable to obtain advance parole due to insufficient INS administrative resources and was placed in exclusion proceedings immediately upon return from an absence; no indication that her parole status was extended to allow adjudication of her application). Such is not the case before us, however, and we express no view on the proper resolution of such a case.

family attending a particular outcome are relevant to construing the intent exception, *Zimmerman v. Lehman*, 339 F.2d 942, 948-49 (7th Cir. 1965) (considering permanent resident's length of residency and family ties); and, if so, how relevant, *Lozano-Giron v. INS*, 506 F.2d 1073, 1077-80 (7th Cir. 1974) (despite nine years of permanent residence, no evidence of significant family, property, or employment ties in the United States). We think this is the sense in which Congress intended the phrase "brief, casual, and innocent absence": that an applicant's absences will be evaluated in this well-understood manner for the purpose directed by Congress—*i.e.*, for the purpose of determining whether the legalization applicant has satisfied the continuous physical presence requirement.

(c) Conclusion: the Meaning of the Statute

For these reasons, we respectfully disagree with the holding of *Espinoza-Gutierrez* that the adoption in §245A(a)(3)(B) of the *Fleuti* factors renders this statute ambiguous with respect to the issue before us: whether a legalization applicant returning from a brief, casual, and innocent absence makes an "entry" under the immigration statutes. Summarizing, we believe that the plain language of subparagraph (a)(3)(B) limits the effect of the "brief, casual, and innocent absences" exception to the continuous physical presence requirement, and we believe that our interpretation is the only one that is consistent with the organizational structure of the statute. We hold that the statute is unambiguous and that subparagraph (a)(3)(B) addresses only the eligibility requirement, and does not affect the definition of "entry" for legalization applicants.[20]

[20] In a different, but analogous context, the Second Circuit rejected an argument similar to Faltas'. *Patel v. McElroy*, 143 F.3d 56 (2d Cir. 1998). Patel argued that his return to the United States following a brief, casual, and innocent trip did not constitute an entry and, therefore, he should be deemed "already within the United States and properly subject to 'deportation' proceedings and not 'exclusion' proceedings." *Id.* at 59. The court rejected that argument. *Id.* ("We disagree."). Similar to the instant context, the "brief, casual, and innocent" absence exception applied to the continuous physical presence requirement for eligibility for suspension of deportation, former INA §244(a), 8 U.S.C. §1254 (repealed by IIRIRA), and did not alter the well-settled definition of "entry." 143 F.3d at 59. *But see Mendoza v. INS*, 16 F.3d 335, 336-37 (9th Cir. 1996) (dicta possibly pointing to the contrary, also in the context of suspension of deportation).

(d) Faltas's Other Arguments Regarding (a)(3)(B)

Faltas advances several additional arguments in favor of her reading of the statute, all of which are readily rejected. She argues that the interpretation of the statute she advances is supported by the principles that ambiguity in the immigration statutes be construed in favor of the alien, *Cardoza-Fonseca*, 480 at 449, and that IRCA, a remedial program, ought to be construed liberally. *Cf. Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (as a remedial statute, §1983 "should be liberally and beneficently construed") (internal quotation and citation omitted). These venerable principles of statutory construction, however, apply only where the statute is ambiguous. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) ("When the words of a statute are unambiguous ... 'judicial inquiry is complete.'") (citation omitted). Finding no ambiguity, we have no opportunity to apply these principles.

Faltas argues that the above interpretation of §245A(a)(3)(B) is inconsistent with the nature of IRCA as an amnesty program, and specifically conflicts with the prohibition against deporting an applicant on the basis of information obtained from the application found in §245A(c) and the temporary stay of deportation for legalization applicants required by §245A(e). Paragraphs 245A(c)(4) and (5) require the confidentiality of information submitted in a legalization application. If unlawful residents suspected that they would be detected and deported by voluntarily identifying themselves to the INS, applications for immigration amnesty would obviously be deterred. *See Perez v. INS*, 72 F.3d 256, 259 (2d Cir. 1995) (confidentiality provision assures unlawful residents that they will not "come forward only to be snared by the INS") (quotation and citation omitted). The exclusion proceedings against Faltas were in no way based on information obtained from her legalization application, however. Her exclusion order is based on her attempted entry on October 29, 1989, without valid travel documents. The fact that exclusion, rather than deportation, procedures were used is irrelevant to protecting the confidentiality of her application. Whether legalization applicants are subject to exclusion or deportation upon their return from a brief absence would have no effect on the incentives of unlawful residents to apply.

Our interpretation is also consistent with the temporary stay of deportation. Section 245A(e) provides a temporary stay of deportation for applicants and grants temporary work authorization until the application is approved or denied. Faltas was not ordered excluded until after her application was denied and this denial was affirmed on administrative appeal. *See Yao v. INS*, 2 F.3d 317, 319 (9th Cir. 1993) (IRCA bars the execution of deportation orders, not the commencement of proceedings, pending resolution of the application). Indeed, she was paroled into the United States in order to continue pursuit of her legalization application, a benefit he would not have received absent IRCA. The procedures used to adjudicate her admissibility in no way diminished the availability of temporary relief from being ordered out of the country pending evaluation of her application for immigration amnesty. In short, the remedial purposes of IRCA would not be served by adopting the interpretation Faltas urges.

Faltas also points to §1504(c) of the Legal Immigration Family Equity Act Amendments of 2000 ("LIFE Act Amendments"), Pub.L.No. 106-554, 114 Stat. 2763 (2000) (enacting H.R. 5666, 106th Cong.)[21] She contends that this provision demonstrates that legalization applicants are treated differently under the immigration law for parole purposes, supporting her argument that legalization applicants are not subject to parole upon return from a brief, casual, and innocent trip. The provision of the LIFE Act Amendments on which Faltas relies, however, simply allows spouses and unmarried children of certain class action members to be paroled into the country without counting against numerical limits on immigration. Nothing in this amendment indicates that the conditions and restrictions of parole do not

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21 If an alien has obtained lawful permanent resident status under section 1104 of the Legal Immigration Family Equity Act and the alien has an eligible spouse or child who is no longer physically present in the United States, the Attorney General shall establish a process under which the eligible spouse or child may be paroled into the United States in order to obtain [certain immigration benefits] .... An alien so paroled shall not be treated as paroled into the United States for purposes of section 201(c)(4) of the Immigration and Nationality Act ....

LIFE Act Amendments §1504(c). Section 201(c)(4) of the INA, 8 U.S.C. §1151(c)(4), requires that parolees who do not depart within 365 days or legalize their status be counted against annual numerical immigration limits.

apply with equal force to aliens so paroled. The benefits of this provision accrue to potential immigrants who would otherwise face exhausted immigration limits, not to the paroled aliens.

2. Agency Construction

Even if we were to conclude that INA §245A(a)(3)(B) is ambiguous, we would defer to the INS's reasonable interpretation of that provision as limited to eligibility for legalization. *Aguirre-Aguirre*, 526 U.S. at 424, 119 S.Ct. at 1445. The regulation implementing subparagraph (a)(3)(B) is found in 8 C.F.R. §245a.2(l). The INS considers an absence "brief, casual, and innocent" only if the alien obtains advance parole for the trip, unless the departure was out of the alien's control. §245a.2(l)(2)[22] *See also* 8 C.F.R. §245a.2(m)(1)[23] The provision for advance parole clearly indicates that the INS considers the returning legalization applicant to be seeking entry. The term "parole" has a well-established meaning: that the alien is allowed into the country but remains constructively at the border, seeking admission and subject to exclusion proceedings.[24]

Faltas argues that §245a.2(m) shows that the INS does not consider a returning legalization applicant as entering because it allows an applicant to be "readmitted." The reference to readmission, however, is immediately qualified by the phrase, "provided his or her departure was authorized under the Service's advance parole provisions contained in §212.5(f)...." Though there is some tension between the characterization of the alien's return as

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22 A brief, casual and innocent absence means a departure authorized by the Service (advance parole) subsequent to May 1, 1987 of not more than thirty (30) days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control.

8 C.F.R. §245a.2(l)(2).

23 (1) During the time period from the date that an alien's application establishing prima facie eligibility for temporary resident status is reviewed at a Service Legalization Office and the date status as a temporary resident is granted, the alien applicant can only be readmitted to the United States provided his or her departure was authorized under the Service's advance parole provisions contained in §212.5(f) of this chapter.

(2) An alien whose application for temporary resident status has been approved may be admitted to the United States upon return as a returning temporary resident provided he or she [meets certain requirements].

8 C.F.R. §245a.2(m).

readmission and the requirement of obtaining advance parole the BIA's decision in *Singh* demonstrates that the INS does not interpret §245a.2(m)(1) as creating an "entry" exception.[24] Although the BIA did not address the effect of the language on which Faltas relies, it approved the application of exclusion proceedings to a returning legalization applicant who did not apply for advance parole prior to his departure. The BIA indicated that, had the alien's departure been "brief, casual, and innocent," he would have been eligible for parole through the exercise of prosecutorial discretion described in internal INS guidelines. *Singh*, 21 I. & N. Dec. at 433. The BIA clearly considered the alien to be seeking entry regardless of the character of the absence, which the Board refused to consider because it was relevant only to the alien's eligibility for legalization. Discussing INA §245A(a)(3), the Board emphasized the distinction

> between section 245A of the Act, which addresses eligibility for temporary resident status, and the concept of excludability, which involves an alien's ability to legally

[24] We note that the Ninth Circuit has interpreted 8 C.F.R. §245a.2(l)(2) as evidence that the INS construes INA §245A(a)(3)(B) as creating an "entry" exception for legalization applicants. *See Espinoza-Gutierrez*, 94 F.3d at 1276. The court relied on the language of that regulation defining a brief, casual and innocent absence as "a departure authorized by the Service ...." This language, the court reasoned, demonstrates that the INS views §245A(a)(3)(B) as a "border-crossing mechanism." 94 F.3d at 1276. We think that, because an "absence" necessarily implies a departure and a return, that is, a border crossing, this language does not address the essential question of what effect that border crossing has on the alien's status. The question is not whether the regulations contemplate a border crossing, but whether the INS construes §245A(a)(3)(B) as creating an exception to the entry definition. We think the requirement of advance parole strongly suggests that the INS does not; if a legalization applicant were not seeking "entry," there would be no need for parole. The court in *Espinoza-Gutierrez* went on to invalidate 8 C.F.R. §245a.2(l)(2)'s advance parole requirement as in conflict with the court's perception of the INS's interpretation of the statute, treatment that we think is inconsistent with the court's reliance on that very regulation to demonstrate the INS interpretation. *See* 94 F.3d at 1277. Contrary to *Espinoza-Gutierrez*, we do not believe that the INS regulations construe the statute as creating an exception to entry. Our interpretation is supported by the regulation's advance parole requirement, and we do not view the obvious border-crossing aspect as speaking to the issue of an entry exception, *vel non*. Even more significant, the BIA has expressly construed the statute as addressing eligibility and not as revising the definition of entry. See the discussion of *In re Singh*, 21 I. & N. Dec.427 (BIA 1996) *(en banc)*, below. The *Espinoza-Gutierrez* court was apparently unaware of the *Singh* decision.

> enter the United States. We clearly have no authority to decide whether an applicant, ordered excluded by this Board due to lack of proper documents, may still demonstrate eligibility for temporary resident status ... As to excludability, we note that Congress did not create an exception to section 212(a)(7)(A)(i)(I) of the Act [excludability for lack of valid travel documents] ... when it enacted section 245A of the Act. *Moreover, the definition of 'entry' set forth at section 101(a)(13) ... has not been revised....*

Id. at 434 n.8 (emphasis added). We would defer to this interpretation, which is neither plainly erroneous nor inconsistent with statute or the regulation. *Auer*, 519 U.S. at 461, 117 S.Ct. at 911. *Singh* interprets the regulations as treating returning legalization applicants as seeking entry. We hold that this regulatory interpretation of the statute is permissible.

B. *Petitioner's Other Arguments*

Faltas's primary argument is that she did not "enter" the country on October 29, 1989. She advances several other arguments which we will now address.

1. INA §245A(d)(2)(A)

Faltas complains that excluding her for lack of valid travel documents contravenes INA §245A(d)(2)(A)[25] However, this provision waives the ground of excludability only for the eligibility requirement of admissibility, §245A(a)(4)(A). It does not give legalization applicants a free pass to cross and re-cross the borders without valid travel documents. It only allows a legalization application to be approved even though the applicant would be inadmissible for lack of labor certification or valid entry document.

2. Notice of the consequences of departure

The adequacy of the notice Faltas received regarding the potential consequences of her 1989 departure does not affect the propriety of exclusion proceedings. While Faltas argues that she was never notified that accepting advance parole would change her status from an alien in the United States, subject to deportation proceedings, to that of an alien seeking admission, subject to exclusion, the INS is under no duty, constitutional or

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[25] Section 245A(d)(2)(A) provides:

> "In the determination of an alien's admissibility under subsection[] (a)(4)(A)... The provisions of paragraphs (5) [labor certification requirements] and (7)(A) [entry document requirements] of section 212(a) shall not apply."

otherwise, to provide aliens with legal advice on the effects of parole. *Balogun v. Attorney General*, 303 F.3d 1303, 1312 (11th Cir. 2002). Moreover, parole has a well-established legal meaning.

3. *Joshi*

Faltas argues that *Joshi v. INS*, 720 F.2d 799 (4th Cir. 1983), requires the termination of exclusion proceedings against her. In that case, a lawfully admitted nonimmigrant applied for adjustment of status under INA §245. While his application was pending, he received advance parole to travel to India After his return, his application was denied and he was placed in exclusion proceedings, where his adjustment application was unreviewable by the immigration judge. He was apparently excluded on the basis of the expiration of his authorized stay as a nonimmigrant. The court held that he was entitled to deportation proceedings. The court in *Joshi* relied on the regulations in force at that time governing travel by adjustment applicants, which provided that upon an applicant's return from an authorized trip, "the application shall be adjudicated without regard to the departure and absence." 720 F.2d at 801. The court reasoned that the alien was entitled to adjudication of his application for adjustment of status in deportation proceedings before his departure, and was therefore entitled to the same right on his return. *Id.* at 802. The court also noted that, had the alien been denied admission based on his status as an entering alien upon his return from India, exclusion proceedings would have been appropriate. *Id.*

The regulation relied upon by the *Joshi* court has since been amended to explicitly require the application of exclusion proceedings to adjustment applicants paroled into the country following a brief departure. *See* 8 C.F.R. §245.2(a)(4)(ii). In any event, the *Joshi* decision is irrelevant to the disposition of this case. The regulations construed in that case pertained to applicants for adjustment of status. Faltas relies on her status as a legalization applicant, not as an adjustment applicant. She had no adjustment applications pending at the time of her departure.[26] [overleaf]

C. *Motion for Reconsideration*

Finally, Faltas appeals the BIA's denial of her motion for rehearing. Under 8 C.F.R. §3.2(a), the decision to grant a motion to

reconsider "is within the discretion of the Board, subject to the restrictions of this section." We review the BIA's denial of a motion to reconsider for abuse of discretion. *Cf. Mejia-Rodriguez v. Reno*, 178 F.3d 1139, 1145 (11th Cir. 2001) (denial of motion to reopen under 8 C.F.R. §3.2(a) reviewed for abuse of discretion). In her motion to reconsider, Faltas essentially argues that the BIA's decision rested on an erroneous interpretation of the law. Based on the foregoing discussion, it is clear the BIA did not abuse its discretion in denying the motion.

V. CONCLUSION

Because Faltas sought to enter the United States on October 29, 1989, without valid travel documents, she was excludable. When her parole was subsequently terminated, she was properly placed in exclusion proceedings. Accordingly, the petition is **DENIED**[27]

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[26] *Joshi* also held that the advance parole at issue in that case was a purely administrative procedure not promulgated under the authority of INA §212(d)(5), 8 U.S.C. §1182(d)(5) (granting the Attorney General discretion to parole aliens into the United States in certain circumstances). *See Joshi*, 720 F.2d at 803. We do not believe that holding has any application to the case at bar. Whether or not the (now-superseded) regulation addressed by the Joshi court derived its authority from §212(d)(5) says nothing with respect to the derivation of the advance parole authority exercised in the instant case pursuant to 8 C.F.R. §245a.2(l) and (m). The instant regulations expressly refer to the advance parole provisions of 8 C.F.R. §212.5(f), which in turn was expressly promulgated under the authority of INA §212(d)(5). See 8 C.F.R. §212.5(a). This exercise of advance parole authority is not an unreasonable interpretation of the Act. If, or to the extent that, *Joshi* suggests otherwise, we disagree.

[27] Any outstanding motions not expressly addressed in this opinion are denied.

Following oral argument, the parties briefed the issue of whether Faltas is ineligible for legalization and excludable/deportable based on the two-year foreign residence requirement, INA §§212(e) and 245A(a)(2)(C). This issue is not relevant to the question presented by the petition for review, which is whether the exclusion proceedings were proper. Furthermore, this issue appears relevant only to the merits of Faltas' legalization application. INA §245A(f)(4)(A) appears to limit our jurisdiction to review the merits of a legalization application to the review of deportation proceedings, and Faltas advances no argument for why we might have jurisdiction to hear her foreign-residence requirement arguments. We therefore decline to address that issue.

Filed April 4, 1994 **COLUMBIA, SC**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Soraya F. Fares, and Marie-Therese H. Assaad-Faltas, Plaintiffs,

v. C/A No.: 3:93-3303-17BC

U.S. Immigration and Naturalization Service; [*et al.*]
Defendants.

ORDER

In an order dated March 2, 1994, this court dismissed the above-captioned case. The court determined that the plaintiffs had not fully exhausted available state remedies before the Board of Immigration Appeals. For this reason, all of the plaintiffs' claims, save one, were dismissed without prejudice. The one remaining claim, a privacy claim, was dismissed with prejudice.

The plaintiffs filed a timely notice of appeal to the United States Court of Appeals for the Fourth Circuit, and then returned to this court seeking a stay of its order of dismissal pending the appeal. A total of five briefs related to the motion for a stay have been filed by the parties. The court has carefully considered these submissions and has decided that oral argument on the motion would not aid in the decisional process. For the reasons set forth below, the motion to stay the order of dismissal in its entirety is denied. The court will, however, require that the Immigration and Naturalization Service provide the court with advance notice in the event that it decides to take plaintiff Marie-Therese H. Assaad-Faltas into custody.

Simply stated, the court's order of dismissal determined that this action was premature, and that plaintiff Faltas must first exhaust all avenues of relief available to her before the administrative agency. An appeal has been taken from that decision. In asking this court to stay its order, the plaintiffs in essence seek the court's blessing to take no action[1] before the administrative agency while the appeal is heard. In order to obtain the requested stay, the plaintiffs must show that:

(1) they have a likelihood of success on the merits of their appeal;
(2) they will be harmed irreparably without a stay;
(3) no substantial harm will come to the opposing party; and
(4) the granting of a stay would serve the public interest.

1 Read broadly, the motion may be considered as an effort to prohibit the INS from going forward with the pending proceedings.

Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970). To the extent the plaintiffs ask the court to relieve them from the burden of proceeding administratively, the motion must be denied. The plaintiffs have not made a credible showing of a likelihood of success on the merits of their appeal of this court's decision to refrain from taking jurisdiction over the case at this time.

In ruling upon the jurisdictional question, the court carefully and conscientiously considered the voluminous submissions by the plaintiff, and heard extensive oral argument. The court does not find a likelihood of success on the merits of the appeal.

In addition, the plaintiffs have not shown that they will be harmed irreparably without a stay. Moreover, the harm that would accrue to the non-moving party (the INS defendants) is significant. The INS would effectively be prohibited from carrying out its assigned duties while an appeal goes forward. Finally, it is in the public interest that the court not needlessly stay a decision. For these reasons, the court will not stay its decision to dismiss this action for the reasons stated in the March 2 order.

The plaintiffs' motion for a stay may also be read as a request that the court continue in force its previous injunction preventing the government from arresting or detaining plaintiff Faltas during the pendency of an appeal to the Fourth Circuit or until the Fourth Circuit can rule on a motion for a stay filed with that court. The defendants strongly object to a continuation of the injunction, arguing that, although the INS has "no immediate plans" to arrest and detain plaintiff Faltas, an injunction would interfere with the Attorney General's authority to enforce immigration laws. Plaintiff Faltas' request for protection against arrest stands on a different footing than her request to be relieved of her obligation to exhaust administrative remedies. Throughout the course of this proceeding, Dr. Faltas has expressed concern for her safety if she is arrested and detained. This concern appears to be genuine. It is not clear from the INS defendants' brief what, if any, action the INS plans to take with regard to Dr. Faltas while her appeal is pending.

Rather than enjoin the INS from detaining or arresting Dr. Faltas, the court prefers to require the INS to notify the court if and when it intends to take such action, so that the court can then consider the plaintiffs' request for injunctive relief. If the INS does not attempt to arrest or detain Dr. Faltas while the appeal is pending, then there is no need for the injunction. If the INS

contemplates such action, the court should be notified sufficiently in advance for the court to entertain an appropriate motion.

On March 10, 1994, plaintiffs filed a reply to the INS defendants' opposition to a stay pending appeal. In the concluding paragraph of that document, the plaintiffs suggest that the court should reconsider its March 2, 1994 order. The INS defendants have treated this as a formal motion to reconsider, and have fully briefed the question of whether the March 2 order should be reconsidered or modified. The plaintiffs have responded with two additional memoranda suggesting that reconsideration is appropriate. The court has studied these papers and finds no basis for disturbing its earlier order.

The court does observe that it erred in stating that plaintiff Fares is the mother of two other daughters who are both United States citizens. *See* March 2, 1994 order at pp. 7 and 13. It now appears that daughter three is a United States citizen and daughter two is in the United States as an exchange visitor.[2]

The plaintiffs had argued that even if Dr. Faltas is required to fully exhaust administrative remedies available to her, the court should retain jurisdiction of the case and rule upon the constitutional challenges to the immigration statutes because of Ms. Fares' other daughters. The court reasoned that because these two other daughters were United States citizens, Ms. Fares could not assert her constitutional challenges to the immigration statutes based upon her relationship to those other daughters. Having now been informed that one of the other two daughters is not a United States citizen, the court nevertheless reaffirms its earlier position. The plaintiff has offered no explanation of why, like Dr. Faltas, daughter two should not be required to exhaust available administrative remedies and pursue other avenues of remaining in this country before asking the court to rule unconstitutional a long standing federal law.

Accordingly, the May 2 order is hereby amended at pages 7 and 13 to correctly state that of plaintiff Fares' other two daughters, daughter three is a United States citizen and daughter two is in the United States as an exchange visitor. In all other respects the March 2 order is reaffirmed and the motion to reconsider is denied.

Plaintiffs have filed yet another motion with this court, seek-

2 The court uses the shorthand reference to "daughter two" and "daughter three" because that is the way the daughters are referred to in the plaintiff's filings and the court is unaware of the actual names of these daughters.

ing a temporary restraining order and a preliminary injunction to prevent the defendants from "tampering" with Dr. Faltas' legalization application. In footnote four of a memorandum in opposition to reconsideration filed by the INS defendants on March 25, 1994, the INS defendants explained that plaintiff Faltas' alien file located in the Atlanta INS office contains copies of some legalization documents relating to Dr. Faltas.

Under *McNary v. Haitian Refugee Center*, 111 S.Ct. 888 (1990), the INS is prohibited from using any information in a legalization application for enforcement purposes. The plaintiffs contend that the admission by the INS defendants that the legalization documents are in the immigration file is a tacit admission that the INS defendants are improperly using the information.

Without expressing any opinion on the merits of this controversy, the court declines to entertain the motion because it is not properly before the court. This court has previously dismissed this action and the matter is now back before the court upon a motion for reconsideration. The plaintiffs may not continue to utilize the jurisdiction of this court to challenge procedures of the Immigration and Naturalization Service in a case which has been dismissed. If the plaintiffs wish to have the court further intervene in the administrative proceedings, a new action must be filed.

For all of the foregoing reasons,*** [t]he motion for a continuation of the injunction against arresting or detaining the plaintiff is denied, with understanding that the INS must notify this court well in advance of any effort to arrest or detain plaintiff Faltas. The motion for reconsideration is denied, but the March 2 order is modified to correctly state the status of plaintiff Fares' other two daughters. The motion for injunctive relief filed on March 30, 1994 is denied.

This action is dismissed in accordance with the March 2 order. That is to say, the privacy act claim is dismissed with prejudice, and all other claims dismissed without prejudice. This action is now ended, and the court retains jurisdiction only insofar as it is necessary to entertain a request for injunctive relief if and when the INS defendants attempt to arrest or detain plaintiff Faltas.

IT IS SO ORDERED.

S/Joseph F. Anderson, Jr.
United States District Judge

April 4, 1994
Columbia, South Carolina

[UNPUBLISHED]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SORAYA F. FARES,
MARIE ASSA'AD-FALTAS, Plaintiffs-Appellants,
v. No. 94-1339
U.S. IMMIGRATION & NATURALIZATION SERVICE;
THOMAS P. FISCHER, District Director,
U.S.. Immigration and Naturalization Service;
UNNAMED IMMIGRATION EMPLOYEES,
in their official capacity, Defendants-Appellees,
and JOAN M. ALTEKRUSE, in her individual capacity, Defendant.

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Joseph F. Anderson, Jr., District Judge
(CA-93-3303-3- 17-B)
Submitted: February 28, 1995
Decided: March 20, 1995

Before MURNAGHAN and WILKINSON, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished *per curiam* opinion. Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

COUNSEL

Orin G. Briggs, Greenville, South Carolina, for Appellants. Frank W. Hunger, Assistant Attorney General, David J. Kline, Michelle Y.F. Sarko, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

OPINION

PER CURIAM:

Appellants appeal from district court orders that dismissed a claim under the Privacy Act, 5 U.S.C.A. § 552a (West Supp. 1994), for lack of standing, and dismissed Appellants' challenges to exclusion proceedings and claims concerning adjustment of status for lack of jurisdiction because they had not exhausted administrative remedies. For the reasons discussed below, we affirm.

Appellants Soraya F. Fares (Fares), a United States citizen, and her daughter, Dr. Marie-Therese H. Assa'ad-Faltas (Faltas), a citizen of Egypt, are both Coptic Orthodox Christians, a minority in largely Muslim Egypt. Fares and Faltas fear that if Faltas is sent back to Egypt, she will suffer persecution and possible physical harm because she is a religious minority.

Faltas entered the United States as an exchange visitor using a J-1 visa. Under the terms of this visa, Faltas was allowed to come to

the United States to study for a graduate medical degree on the condition that she return to Egypt for two years following the completion of her program before she could become eligible for permanent residence in the United States. Faltas's visa expired in May 1982. She remained in the United States, however, even though the INS sent her a letter requiring her to depart by November 10, 1982. Faltas left the country in September 1983, and returned on December 4, 1983 using a B-2 temporary visitor's visa. Although B-2 visas automatically expire after six months and may only be renewed for one additional six-month period, Faltas remained in the United States for over four years.

On May 4, 1988, Faltas applied for amnesty and legalization. The INS denied Faltas's application in January 1990. The INS Legalization Appeals Unit denied Faltas's appeal in February 1992. In a separate proceeding in June 1988, Faltas submitted an application to the INS to adjust her status to lawful permanent resident based upon an approved second-preference visa petition. The INS denied the application in October 1988. One of the reasons the application was denied was that Faltas failed to fulfill her two-year Egyptian residency, or "homestay," requirement. In October 1988, the INS commenced deportation proceedings against Faltas because her B-2 visitor's visa expired. During these proceedings, Faltas requested and was granted advance parole because she had decided to leave the United States; advance parole gave her pre-approval to return while her legalization application was being processed. Because Faltas was now a parolee and no longer deportable, the immigration judge terminated deportation proceedings pursuant to Faltas's motion. In January 1990, the INS denied Faltas's application for legalization. Because Faltas was granted parole for the express purpose of pursuing legalization, she was eligible to have her parole revoked. However, because Faltas appealed the denial of legalization, the INS extended Faltas's parole until March 1, 1991, or until her legalization appeal was decided, whichever occurred first.

In June 1990, Faltas applied a second time for adjustment of status based on a first-preference visa petition because her mother, Appellant Soraya F. Fares, had become a United States citizen. The INS denied the application because Faltas failed to fulfill her homestay requirement and because she engaged in unlawful

employment between April 1985 and April 1987. Faltas's third application for adjustment of status, filed in June 1992, was lost and therefore never acted upon by the INS.

In December 1993, Faltas's work authorization expired. At the time of the district court's decision, Faltas's renewal application had not been adjudicated. After the second adjustment application was denied and after the Legalization Appeals Unit denied Faltas's appeal of her legalization application, the INS revoked Faltas's parole and commenced exclusion proceedings, charging that Faltas was excludable because she was an immigrant without a valid unexpired entry document. The INS instituted the proceedings because Faltas had not fulfilled the two-year homestay requirement and the INS had not received a "no objection" letter from the Egyptian government waiving the homestay requirement. While the exclusion proceedings were pending, but before there was an order of exclusion or deportation, Faltas and Fares initiated the present action.

Fares and Faltas sought declaratory and injunctive relief as well as damages from the Defendants. Specifically, they requested an order enjoining the INS from proceeding against Faltas in exclusion proceedings and requested that the district court adjudicate the exclusion proceedings. Additionally, they requested that the district court declare that the INS wrongfully denied Faltas's adjustment of status and that the court enjoin the INS from denying Faltas's application to adjust status. Further, they requested that the court order the INS to renew Faltas's work authorization. They also alleged that the INS had revealed Faltas's immigration file to unauthorized persons. Finally, Appellants asserted that the INS had committed a series of constitutional violations and raised an equal protection claim through various subsequent filings with the district court. The plaintiffs claimed that the immigration laws violated Fares's equal protection rights because the laws provided special treatment for a citizen spouse or child of an exchange visitor, but did not provide similar treatment for a citizen parent or sibling of an exchange visitor.

The district court entered a preliminary injunction prohibiting the INS from taking Faltas into custody or deporting her pending briefing and a hearing on whether the district court had jurisdiction over the claims. After the hearing, the district court dissolved the injunction and held that Faltas failed to

exhaust her administrative remedies; the court dismissed all but one of her claims without prejudice on these grounds. The court construed Faltas's remaining claim, that unauthorized persons viewed her immigration file, as a claim under the Privacy Act, 5 U.S.C.A. § 522a (West 1977 & Supp. 1994), and dismissed that claim with prejudice. The court found that since Faltas was not a citizen, she lacked standing to bring the claim.

Faltas and Fares moved for reconsideration and requested a stay of the district court's order dissolving the injunction pending the outcome of the appeal. The district court denied the motion on both counts. The court, however, ordered the INS to inform the court prior to deporting Faltas so Faltas would have an opportunity to request an injunction.

I.

The district court dismissed Appellants' request for relief with respect to the exclusion proceedings. Although the proceedings were pending, an exclusion order had not been entered. An alien must exhaust all administrative remedies before an exclusion order is considered final and subject to judicial review. 8 U.S.C. § 1105a(c) (1988). Even then, a final order of exclusion may only be reviewed in a properly initiated habeas corpus proceeding. 8 U.S.C. § 1105a(b) (1988). Because Faltas has not exhausted her administrative remedies and there has not been a final order of exclusion, the district court properly concluded that it could not entertain Appellants' challenges to the exclusion proceedings.

II.

In their complaint challenging the INS's denial of Faltas's adjustment of status, Appellants contend that they should not be required to exhaust administrative remedies since there is no appeal from a denial of adjustment of status. They are partially correct. The decision to grant adjustment of status is discretionary, 8 U.S.C. § 1255(a) (1988), and no appeal lies from the denial of adjustment of status. 8 C.F.R. § 245.2 (a)(5)(ii)(1994). However, when an adjustment of status application has been denied, it may be renewed in exclusion proceedings. 8 C.F.R. §245.2 (a)(1). In addition, during the exclusion hearing, Faltas may apply for asylum based on her fear of religious persecution. 8 C.F.R. §§208.13, 209.1, 209.2.

Before a person is entitled to judicial relief for a prospective injury, she must first exhaust her administrative remedies.

Darby v. Kemp, 957 F.2d 145, 147 (4th Cir. 1992), *rev'd on other grounds*, 61 U.S.L.W. 4679 (U.S. 1993). The exhaustion doctrine allows an agency to exercise its discretion and apply its expertise, ensures autonomy, and avoids premature intervention by the courts. *Id.* It also allows the courts to benefit from a fully developed agency record. *Id.*

A party is not required to exhaust administrative remedies if: (1) the dispute concerns statutory construction; (2) using administrative procedures would cause irreparable injury; (3) resorting to administrative procedures would be futile; (4) administrative remedies would be inadequate; or (5) the administrative decision would go unreviewed. *See generally Darby*, 957 F.2d at 147; *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1063 (4th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3815 (U.S. 1992). Faltas's request for review of her denial of adjustment of status does not fall into any of these exceptions. It does not involve statutory construction. Requiring Faltas to first renew her request for adjustment of status in front of an immigration judge (IJ) at the exclusion proceedings would not cause irreparable injury. Presenting the request to the IJ would not be futile. If the IJ grants Faltas's request, that would be an adequate remedy. Finally, if the IJ denies the request for adjustment of status, that denial would be subject to judicial review in a habeas action challenging the exclusion order. *See Crespo-Gomez v. Richard*, 780 F.2d 932, 933-34 (11th Cir. 1986) (reviewing denial of discretionary relief incident to exclusion proceeding in habeas appeal). Thus, since Faltas failed to exhaust her administrative remedies, and because this case does not fall into one of the exceptions enumerated above, the district court properly concluded that it would be premature to review Faltas's claim that she was improperly denied adjustment of status.*

III.

Appellants assert that since their claims involved constitutional challenges which could not be resolved through administrative channels, the district court should have retained jurisdiction over those claims. A court should not decide questions of constitutionality unless there is no other ground upon which the case can be disposed. *Ashwander v.*

*For these same reasons, the district court properly dismissed, as not ripe for review for failure to exhaust administrative remedies, Faltas's request that INS be ordered to issue her a work authorization.

Tennessee Valley Authority, 297 U.S. 288, 346-47 (1936). Appellants have many opportunities for relief before a court would be required to entertain their constitutional challenges. Thus, the district court properly concluded that the mere presence of constitutional claims does not exempt Appellants from the requirements of the doctrine of administrative exhaustion. *Aircraft & Diesel Equip. Corp v Hirsch*, 331 U.S. 752, 763-67 (1947)

IV.

The district court properly construed Faltas's invasion of privacy claim as a claim under the Privacy Act. Additionally, Faltas conceded that it was a Privacy Act claim in her brief filed with this Court. The district court properly found that Faltas was not protected by the Privacy Act since the Act only protects citizens of the United States or aliens lawfully admitted for permanent residence. 5 U.S.C. § 552a(a)(2) (1988). Faltas does not fall into either category. Accordingly, the district court properly dismissed this claim with prejudice.

In light of the foregoing, we deny Appellants' motion for judicial notice and affirm on the reasoning of the district court. We also deny Appellants' motion for oral argument and Appellants' emergency motion for a three-judge panel to hear oral argument on the motion for oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid in the decisional process. To the extent that the motion for oral argument was considered by a three-judge panel, we grant Appellants' motion for referral of their motion for oral argument to a panel of judges.

AFFIRMED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA
File No.: A 23 524 000

In the Matter of **MARIE THERESE HALIM ASSA'AD**, Applicant
IN EXCLUSION PROCEEDINGS

CHARGE: Section 212(a)(7)(A)(i) of the I&N Act - No valid entry document.
APPLICATION: Termination of proceedings.
ON BEHALF OF APPLICANT: Pro se
ON BEHALF OF SERVICE: Keith E. Hunsucker, Esquire (Asst. District Counsel)

ORAL DECISION OF THE IMMIGRATION JUDGE

The applicant in these proceedings is a 42-year-old single woman, a native and citizen of Egypt who entered the United States initially in the 1970's as an exchange student.

She departed the United States briefly in 1983, returning in December, 1983. At some point following that departure and arrival, she applied for residence under the legalization program of IRCA. During these proceedings she departed the United States in October of 1989 for a few days to visit Canada, returning in October of 1989, at which point she was permitted back into the United States on parole. Subsequently, her application, as the Court understands it, was denied and at that point she was placed in exclusion proceedings by an I-122, see Exhibit 1, dated November 5, 1991.

In the meantime, the applicant had sought work authorization and had previously received work authorization which was extended on several occasions into calendar year 1992. In addition, the applicant's parents have become naturalized United States citizens and have petitioned for the applicant, and their petition on her behalf has been approved and a visa approved.

By virtue of the fact that the applicant has been in exclusion proceedings, then under the law and the regulations, her application to adjust status based upon the approval of the petition, has of course, not been properly before the Immigration Court or the Service, in that a person in exclusion is not eligible for adjustment of status. There are numerous other legal issues in this case, most of which are set out in the record of proceedings and in the tapes of these hearings. Suffice it to say that this is not a

case where the Immigration Service can be faulted unduly, but rather is a case where the applicant has insisted upon representing herself and has made so many technical and procedural objections that the Court is surprised that she did not lodge an objection to the fact that some of the INS paperwork may not have been filled out with black ink. The Court, however, is putting all of that aside and turning to the specific issue before it, and is attempting to resolve this longstanding adjudication, or at least to get the matter into more competent hands for resolution.

FINDINGS OF THE COURT

The Court finds that the applicant in this case was an applicant for legalization under the IRCA Program when she departed the United States for Canada. The Court also finds that the applicant's trip to Canada was brief, casual and innocent, and that it was not meaningfully interruptive of whatever status, if any, she had in the United States in October of 1989. The Court also finds that the applicant was granted work authorization and that that work authorization was extended on two or three occasions, into calendar year 1992. The Court also finds that the employment authorization document was prepared, designed, conceived of, drafted, printed and issued by the United States Immigration and Naturalization Service. Moreover, the Court finds that that document prominently displays on its face, the words to the effect of, that the holder of that document is entitled to **"reside"** and work in the United States during the period that the card is, on its face, valid.

The Court therefore believes that the applicant was improperly placed in exclusion proceedings in that, under the *Fleuti* Doctrine as noted by the 4th Circuit in the *Joshi* case, *Joshi v. District Director. Immigration and Naturalization Service,* 720 F.2d 799 (1983).

The applicant was entitled to re-enter the United States without sacrificing her right to remain in this country subject to deportation, rather than exclusion proceedings. The Government notes that regs relating to this issue have been changed since the *Joshi* decision, although it is unclear precisely when those changes were effective. Under the new regs however, the regs state clearly that a person in exclusion is not entitled to deportation proceedings or something to that effect. In any event, the Court finds that the regulatory change would certainly subject to serious question, the continued validity of the *Joshi* case.

In light of the fact however, that the Service has been unable, on this short-notice, to establish when that change occurred, the Court will assume that the change occurred after the applicant re-entered the United States in October of 1989.

Moreover, with respect to the very interesting choice of law question here, the Court is inclined to think that by virtue of the fact that the Immigration Court in Atlanta is a division or branch of the Immigration Court in Arlington, Virginia, that decisions of this Court may be subject to the 4th Circuit Court of Appeals' review. Alternatively, by virtue of the fact that the applicant resides in South Carolina, which is in the 4th Circuit, there is yet another basis upon which 4th Circuit law could be found to apply. The Court believes in this case that 4th Circuit law does apply and that therefore the *Joshi* case is applicable here with the result that by finding that the departure to Canada comes within the *Fleuti* Doctrine, the applicant was improperly placed in deportation proceedings.

Moreover, this Court is of the view that even though it can be argued as the Service's very excellent attorney has done today, that subsequent regulatory change has undercut *Joshi*, that if that occurred after the October 1989 re-entry from Canada, that the proper remedy for the Service is, upon termination, to commence new exclusion proceedings. The Court agrees that it is possible to say that the old proceedings in essence, revived and became valid with the new regs. This Court is not inclined to feel that is appropriate and is inclined to think by analogy to other areas of law, that if for example, a criminal indictment is quashed for some technical reason, the normal response is to re-indict the case and not to argue that there has been some legal change that has revived the force and effect of the original indictment.

In sum, the Court believes that these exclusion proceedings should be terminated on the *Joshi-Fleuti* rationale. There is, however, in this case, an alternative basis for termination. The alternative theory that this Court has quite frankly advanced *sua sponte*, is that the applicant has been in possession of an employment authorization document which, on its face, states that the holder is entitled to **reside** and work in the United States for the period that the document is valid. As indicated above, the Immigration Service created, formulated, composed these words and printed and issued that particular card, as all others.

Moreover, the Immigration Service extended the employment authorization into calendar year 1992, well past the time when the applicant was issued the I-122 that initiated these exclusion proceedings. The Court believes, therefore, that unless the Immigration Service is deemed to be irrational and to place words on documents issued to aliens which are known to be relied upon, not only by the aliens themselves but by their employers, that the Immigration Service would not place words on such documents that it did not intend to give full force and effect.

By virtue therefore, of extending that work authorization, knowing that the card is worded as it is, the Service must have undeniably intended and in fact, actually extended the period of legal residence in the United States. If therefore, as is the case here, an alien has been paroled into the United States, this Court believes that parole is effectively extended at the same time that that employment authorization document, worded as it is, is extended. Under this line of approach therefore, this Court believes that at the time the applicant was placed in exclusion proceedings, or shortly after she was placed in exclusion proceedings, an official duly authorized by the Immigration Service granted an extension of her employment authorization document, and at the same time, extended her period of parole. Under this theory therefore, either the I-122 was improper when issued, or was subsequently rendered null and void by virtue of an action of an Immigration Official extending the period of parole.

In sum, it is after 4:30 p.m. and this Court is very tired and will hope that any reviewing authority will have mercy upon his bald and graying head, for this mishmash of legal analysis.

ORDER

IT IS HEREBY ORDERED that exclusion proceedings are hereby terminated.

CARY H. COPELAND
Immigration Judge
December 13, 1995

U.S. Department of Justice — Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A 23 524 000 - Atlanta — Date: DEC 20 1996

In re: MARIE THERESE HALIM ASSA'AD
a.k.a. Marie-Therese Halim Assa'ad-Faltas

IN EXCLUSION PROCEEDINGS — **APPEAL**

ON BEHALF OF APPLICANT: Pro se

ON BEHALF OF SERVICE: Keith E. Hunsucker, Assistant District Counsel

EXCLUDABLE: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)]— No valid immigrant visa

APPLICATION: Termination of proceedings; remand

In a decision dated December 13, 1995, the Immigration Judge terminated exclusion proceedings against the applicant. The Immigration Judge reasoned that *Joshi v. District Director, INS*, 720 F.2d 799 (4th Cir. 1983), required that he terminate proceedings and further indicated that the applicant's possession of previously valid work authorizations established a *de facto* extension of her parole status. The Immigration and Naturalization Service has appealed from that decision. The appeal will be sustained. The record will be remanded. The applicant's request for oral argument is denied. 8 C.F.R. 3.1(e).

I. BACKGROUND

At the outset, we recognize the extensive procedural history of the case now before this Board. Because the procedural posture remains in flux after nearly a decade of litigation, we set forth in some detail the case's procedural and factual background.

The applicant, a native and citizen of Egypt, first entered the United States in 1979 as an exchange visitor. The Service authorized her to remain in the United States until May 1982. She voluntarily departed the United States in September 1983. In December of that same year, the applicant reentered the United States as a nonimmigrant visitor for pleasure. The Service authorized the applicant to remain in the United States for a temporary period not to exceed June 3, 1984, and the applicant again failed to depart when and as required. See Group Exh. 4. In June 1988, the applicant filed an application for adjustment of status based on her status as an unmarried daughter of a lawful permanent resident. The Service denied her application in October 1988 because the applicant had failed to comply with the conditions of her exchange visa, as well as for having remained in the United States in violation of law. See Group Exh. 4, tab C.

The Service commenced deportation proceedings against the applicant on November 14, 1988, by filing an order to Show Cause with the Immigration Court. The Service charged the then-respondent with failing to comply with the conditions of her nonimmigrant status. See Exh. 1. At deportation hearings held on August 15, 1989, the Service lodged an additional charge of deportability. It claimed that the then-respondent had remained in the United States longer than permitted.

In January 1990, the then-respondent moved to terminate deportation proceedings. She contended, among other points, that because she had departed the United States in October 1989 with the Service's permission ("advance parole" or Form I-512), the "subject matter of these [deportation] proceedings [] ended with her leaving the U.S. on 27 October 1989." See Respondent's Pro Se Motion to Terminate Proceedings (Jan. 9, 1990); See also Form I-512 (Sept. 29, 1989). She also argued that the doctrines of laches and estoppel barred the Service from proceeding against her. Id; see also Form I-72 (Jun. 28, 1990) (bearing typed response from applicant requesting that the Service rely on her "parolee status only") (emphasis in original).

The Service challenged the then-respondent's motion. It argued that the then-respondent was subject to deportation proceedings because the Service authorized her departure during the course of proceedings. The Service also challenged the arguments grounded in equity and underscored the then-respondent's admission that she had engaged in unauthorized employment. The Service encouraged the Immigration Judge to conclude that the then-respondent was deportable as charged and enter a judgment based on the pleadings. See Government's Answer and Motion for Judgment on the Pleadings (Jan. 16, 1990); see also Government's Motion for Written Order, ¶¶ 2-3 (Feb. 1, 1990).

On March 30, 1990, the Immigration Judge granted the then-respondent's motion to terminate deportation proceedings. The Immigration Judge reasoned that because the applicant had sought, secured, and relied on advance parole for her departure and reentry into the United States in October 1989 "she [did] not return to former status and only [could] enjoy[] the status of parolee." See Memorandum order (Mar. 30, 1990).

The Service subsequently commenced exclusion proceedings against the applicant by filing a Notice to Applicant for Admission

[Deferred] for Hearing Before Immigration Judge. See Group Exh. 4, tab H, Form I-122 (Nov. 5, 1991). In March 1994, the applicant moved to terminate and dismiss exclusion proceedings. Among other points, she principally argued that her authorized departure from the United States in October 1989 as a *prima facie* legalization applicant was "brief, casual, and innocent" and therefore protected under *Fleuti*. See Group Exh. 3, Motion to Terminate and Dismiss Exclusion Proceedings, at 5 (Mar. 32, 1994 [sic]). In addition, the applicant contended that exclusion proceedings were improper because they were "based on a purported final denial of her IRCA application." See id. The parties discussed at length the applicant's motion and the propriety of exclusion proceedings below. Suffice it to say, the Immigration Judge ultimately ruled in favor of the applicant and grounded his decision on the Fourth Circuit's holding in *Joshi v. INS, supra*, and the Service's extensions of work authorizations for the applicant. The ruling to terminate exclusion proceedings is what we now address for purposes of this appeal.

II. DISCUSSION

Based on our review, we find that the Immigration Judge improperly terminated exclusion proceedings below. The Service is correct that *Joshi v. INS, supra*, is inapplicable to these exclusion proceedings, and we agree that the extension of work authorizations did not convert this applicant's parole into an admission. Accordingly, we sustain the Service's appeal and remand for further proceedings.

The Immigration Judge mistakenly relied on *Joshi v. INS, supra*, in the proceeding below, as *Joshi* is clearly distinguishable on its facts. The applicant in *Joshi* had departed the United States with authorization while an adjustment application under section 245(a) of the Act, 8 U.S.C. §§ 1255(a), had been pending. The Fourth Circuit, relying in part on regulatory analysis and on evidence that the applicant therein had not been paroled into the United States pursuant to section 212(d)(5) of the Act, 8 U.S.C. §1182(d)(5), concluded that it would have been incongruent to place that applicant in exclusion proceedings when the (then applicable) regulations expressly required that "the application shall be adjudicated without regard to the departure or absence." See *Joshi, supra*, at 801 n.3.

Unlike the applicant in *Joshi*, this applicant departed the United States with permission based on an emergent reason. See Form I-512; see also section 245A of the Act, 8 U.S.C. §1255a. Furthermore, the applicant was expressly paroled into the United States pursuant to section 212(d)(5) of the Act, 8 U.S.C. §1182(d)(5). See Form I-512. Moreover, post-*Joshi* regulations specifically provide that "[n]o alien granted advance parole and inspected upon return shall be entitled to a deportation hearing." 8 C.F.R. §245.2(a)(4)(ii)(effective July 14, 1986). Further, while not a determinative point, the record shows that the applicant herself, a highly educated individual, was well aware that her departure would have significant legal consequences. Indeed, the applicant once having reentered identified herself as a parolee, and the record further shows that she then repeatedly referenced her "changed status" throughout myriad submissions. To apply *Joshi* to this case would not only ignore significant regulatory changes subsequent to that decision, but also enable this applicant to circumvent a proceeding that she in effect forced the Service to initiate.

Similarly, we reject the notion that the Service *de facto* extended parole through the applicant's work authorization and that that extension nullified the Notice issued November 1991. First, this Board does not consider issues concerning the processing of legalization applications. Legalization is outside this Board's purview and our precedent underscores our sensitivity to the legalization process and the aliens affected by it. See *Matter of Singh*, Interim Decision 3282 (BIA 1996); *Matter of Ponce de Leon*, Interim Decision 3261 (BIA 1996). Second, the applicant's securing of work authorization remained collateral to the proceedings commenced in October 1988 and the motions that followed. Indeed, that she received any extension underscores the confidentiality of the legalization process and the bifurcated approach to applicants' legalization adjudications. Most significantly, however, a grant or extension of work authorization does not convert a parolee into an admittee.

Finally, we note that non-legalization bases had existed to support the commencement of exclusion proceedings below.

The Service pursued grounds independent from her legalization application to deport her initially. Then, the applicant, a former respondent, moved to terminate deportation proceedings because of her "changed" status. Given the Service's vigorous challenge to that motion, a foreseeable consequence was that the Service would then proceed against her in exclusion proceedings. Moreover, evidence of record suggests that the applicant has failed to comply with the conditions of a visitor exchange, or J-1, visa she received nearly two decades ago. In short, we do not find that the Service relied upon a pending legalization application in initiating the proceedings in this case.

III. CONCLUSION

Because we conclude that the Immigration Judge improperly terminated exclusion proceedings, we sustain the Service's appeal and remand that record for further proceedings, which in light of the already lengthy history of this case should be resolved as promptly as possible.

ORDER: The Service's appeal is sustained and the December 13, 1995, decision of the Immigration Judge ordering exclusion proceedings terminated is vacated.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a decision.

S/ FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
101 Marietta Street, Suite 2702
Atlanta, Georgia 30303

File: A23-524-000 **IN EXCLUSION PROCEEDINGS**

In the Matter of:
Marie Therese Halim ASSA'AD, Applicant.
ON BEHALF OF RESPONDENT: Pro Se
ON BEHALF OF SERVICE: Keith E. Hunsucker, Esq.

This matter is before the Court upon remand from the Board of Immigration Appeals (BIA). In its decision the BIA determined that applicant was properly in exclusion proceedings and reversed the order of a previously presiding judge who terminated such proceedings. The BIA noted that this case has an "extensive procedural history" extending over "nearly a decade of litigation." Consequently, the BIA set out a detailed account of the case's procedural and factual background which need not and will not be repeated here.

This case has been the responsibility of the undersigned only since its remand. Therefore, as required, a thorough familiarization with the voluminous record of proceedings was undertaken. 8 CFR Sections 240.1(b), 240.31. There do not appear to be any pre-hearing motions filed prior to remand which require resolution. Any such matters have either been previously disposed of or are subsumed in the motions which have been filed by the parties subsequent to remand. In the latter category is found the motion of the Immigration and Naturalization Service (INS) for a decision on the existing record. In response to that motion, applicant filed her opposition which also contained motions for change of venue and for disqualification of the Atlanta district counsel for the INS and his staff. Though not specifically titled as such, applicant's filing also constituted a motion for disqualification of the presently presiding judge of this Court. These various motions will be addressed seriatim.

MOTION FOR DISQUALIFICATION OF SERVICE COUNSEL

This Court is unaware of any authority for the proposition that counsel for the Service are subject to disqualification. Applicant has cited none in her motion. Rather, it appears that the choice of such counsel is completely within the discretion

of the Service itself. *See* 8 C.F.R. Section 240.32(c). Discipline of attorneys representing the Service is the responsibility of the Office of Professional Responsibility of the Department of Justice. 8 C.F.R. Section 292.3(b)(2). This motion must, therefore, be denied.

MOTION FOR DISQUALIFICATION OF PRESIDING JUDGE

The essence of this motion is that the Court has been tainted by prejudicial ex parte communications. More specifically, applicant cites a message from district counsel for the Service (Mr. Bird) through a third party on or about March 31, 1994, to a previously presiding judge (Judge De Bernardis). She also cites a memorandum from the latter to the undersigned dated May 9, 1995. Both characterize applicant as litigious. The latter also questions applicant's mental health.

Applicant also finds in the procedural history of this case circumstances from which she assumes that the undersigned has already determined himself to be disqualified. More specifically, applicant relies upon the fact that the proceedings of December 13, 1995, were heard by visiting Judge Copeland rather than the undersigned (who was then, and who remains a resident judge in Atlanta). Applicant's assumption is erroneous and without foundation in fact. This case was on the docket of the visiting judge solely because when that docket was compiled the visiting judge was to be Judge De Bernardis, and it was he who theretofore had been presiding over this case. When, shortly before the week in question, Judge De Bernardis was unable to make the trip to Atlanta from Arlington, Virginia, Judge Copeland was assigned in his stead. Judge Copeland heard not just this case but an entire week's calendar. His involvement reveals precisely nothing regarding perceptions of the undersigned—either then or now—concerning this case.

In exclusion proceedings, motions for disqualification/recusal are governed by Section 236(a) of the INA, and by the constitutional due process requirement that the matter be heard by a fair and impartial arbiter. *Matter of Exame*, 18 I&N Dec. 303, 306 (BIA 1982). Section 236(a) mandates recusal only where the judge has participated in the investigative and/or prosecutive functions related to the case. Participation in "similar" cases is not disqualifying; it must be the subject case itself. *Id.* Section 236(a) is inapplicable in this case; applicant makes no claim that it is.

To disqualify an immigration judge on constitutional, fundamental fairness grounds it must be demonstrated that the judge has a personal, rather than judicial, bias stemming from some extrajudicial source, which bias results in an opinion on the merits on some basis other than what the immigration judge learned by participation in the case. *Id.* Also, it must be shown that the extrajudicial information or influence is prejudicial. *Matter of G,* 20 I&N Dec. 764, 780 (BIA 1993).

The May 9, 1995, memorandum central to this motion is 2½ typed pages. With the exception of the first paragraph, which is slightly over 2 lines in length, it is devoted to an historical account of the author's assessment of this case, his reasoning, and his efforts to catalyze a resolution–one which would have been favorable to applicant had it been achieved. This Court perceives no fair reading of this account which can be deemed prejudicial to applicant. What is revealed is the extraordinary lengths to which Judge De Bernardis went to obtain pro bono counsel for applicant and to see that her rights were protected.

The short, first paragraph is no doubt viewed with concern by applicant. It does not describe her in flattering terms. However, even when read at its most adverse–and even if taken as true–its language is not prejudicial to applicant in the context of this litigation. That is because neither a party's mental health nor that party's activities in civil litigation in other forums has a scintilla of bearing upon any matter at issue in *this* case in *this* forum. The rules contemplate that persons with mental abnormalities will be parties before this court even where those abnormalities rise to the level of incompetency. *See* 8 C.F.R. Sections 3.25, 240.4; *see also* 8 C.F.R. Section 240.31.

There is no provision of immigration law (be it statutory, regulatory, or precedential) which requires or permits this Court to either diminish or enhance a party's legal rights according to the Court's assessment of that party's mental health or according to the Court's understanding that the party is or is not involved in civil litigation in some other forum. Therefore, this Court is obligated to deal with applicant in a fair and impartial manner without regard to whether the assessment found in the first paragraph of the subject memo is or is not accurate.

That assessment is properly viewed as nothing more than one person's conclusory expression. It is not binding on anyone else. To the extent formulation of any such assessment is required of the undersigned in the performance of the judicial function, it will be made solely upon the basis of personal observation. To date, applicant has not personally appeared before the undersigned. The undersigned is therefore without present basis for any conclusion regarding applicant's mental health—assuming, *arguendo*, that it constitutes a subject relevant to this case.

The message from District Counsel Bird through an intermediary to Judge De Bernardis also involves mental health and other litigation. For the reasons already stated, this Court finds in it no prejudice to applicant, and no source of influence upon the undersigned. It is simply irrelevant in the context of this case. Furthermore, until it was brought to the surface by applicant herself, the undersigned was completely unaware of it. Applicant cannot poison the well and then complain that the water is tainted. To the extent Mr. Bird's message compromised anyone it would have to be Judge De Bernardis. Since he is no longer presiding, applicant has already accomplished her purpose.

Canon 3(A)(4) of the Code of Conduct for U. S. Judges provides that a judge, except as authorized by law, should neither initiate nor consider *ex parte* communications regarding a pending case. The undersigned did not initiate the communications cited by applicant. The only communication received *ex parte* by the undersigned is the May 9, 1995, memorandum from Judge De Bernardis. Consultation between judges is authorized. Canon 3(A)(4), Commentary. Furthermore, as stated above, it contains nothing arguably prejudicial to applicant which is relevant to any issue in this case. There is, therefore, nothing which should or will be considered by this Court in determining the merits of those issues. In addition, applicant is fully aware of the communications, and she has responded to them by submitting a number of refutory appendages to her motions. Thus, the record reflects both sides of these irrelevancies, and both of them will be properly ignored by this Court.

For these reasons this Court concludes that the record herein does not reflect any extrajudicial source or influence which is prejudicial in nature and which has created or likely will create any improper judicial bias against applicant. Her motion to disqualify is, therefore, properly denied.

MOTION FOR CHANGE OF VENUE

On or about February 4, 1997, applicant filed her response to the Service's motion for a decision on the record (which motion is addressed below). Combined with this response was applicant's "Request and Insistence That the Hearing Be Transferred to Arlington, Virginia and Be Held Before the Chief Judge There." That filing offers no direct exposition of applicant's basis for such a request. In particular, it remains entirely obscure just why this case must be heard only by the "Chief Judge there." To the extent that applicant is indirectly relying upon her claim that the present judge is disqualified, that claim has been resolved above. In a letter dated February 24, 1995, applicant offered some insight regarding the change of venue request. Her filing of March 12, 1995, provided a bit more information. Both submissions, however, are unsupported by affidavit and/or documentation and are essentially conclusory in nature.

This Court's discretion to change the venue of an exclusion case is subject to the existence of good cause for such change. *Matter of Rahman*, 20 I&N Dec. 480, 482 (BIA 1992). The venue question is entrusted in the first instance to the INS District Director, who files the charging document in the venue selected; thereafter, any change is unjustified absent a proper finding of good cause. *Id.* at 483.

The present posture of this case puts in issue only the question of applicant's excludability. If she is not excludable, no other issues are reached; if she is excludable then availability *vel non* of relief from exclusion becomes the issue. Applicant has made no showing at all why at this stage there should be any relocation of the proceedings. She continues to reside in the area of primary jurisdiction for this Court; the charging document was filed with this Court; there is a ten-year history of proceedings in this location; and she has identified no witness(es) necessary to resolution of the present issue who cannot reasonably appear in this forum and/or supply their testimony

by affidavit, deposition, and/or telephone. Nor has she indicated by affidavit and/or proffer the nature and extent of the testimony any such witness(es) could be expected to offer. *Matter of Bader,* 17 I&N Dec. 525,526 (BIA 1980). Therefore, this motion is without present foundation and must be denied, but without prejudice to applicant's ability to refile such a motion at a later date should adequate grounds then obtain.

MOTION FOR DECISION ON THE RECORD

This motion was filed by the INS. The crux of it is that the record has been fully developed by both sides over an extended period of time and, as a result, it already contains sufficient evidence to permit resolution without the necessity of further evidentiary proceedings. As previously noted, the threshold question which is now before the Court is whether applicant is or is not excludable. Applicant has had abundant opportunity to address this question. Indeed, she has filed several responses to the INS motion. However, she has neither made the claim nor even offered the hint that further factual matters needed to be developed through evidentiary hearing in order for this immediate issue to be resolved. (Rather, applicant—and the INS as well—have prematurely addressed themselves to the different and as yet unreached question of relief from exclusion.) The Court concludes that there is no reasonable expectation that further proceedings would assist the Court in determining the issue of excludability. Therefore, the motion to proceed on the record is appropriately granted as to excludability.

DECISION ON EXCLUDABILITY

On the question of excludability the burdens of proof, persuasion, and going forward with the evidence rest with the alien. Only when the alien first makes a *prima facie* showing of admissibility does the burden of going forward with the evidence shift to the INS. The alien at all times retains the ultimate burdens of proof and persuasion. INA Section 291; *Matter of Walsh and Pollard,* 20 I&N Dec. 60, 63 (BIA 1988). This is true unless the alien has a colorable claim to status as a returning lawful permanent resident (LPR). Such a claim puts all such burdens upon the INS. *Matter of Kane,* 15 I&N Dec. 258 (BIA 1975). Nowhere in this record (including applicant's post-remand filings) does

applicant make any claim that when she presented herself at the POE (Port Huron) from Canada on or about October 28, 1989, and was paroled into the United States she was a returning LPR. Therefore, the burden in this case is upon applicant to establish her admissibility.

It has already been judicially determined that applicant was paroled, not admitted, which parole is manifest by a timely issued I-512 that is of record. *Order of Remand*, p. 3 (BIA Dec. 20, 1996). In the proceedings of December 13, 1989, applicant was specifically asked to present any documents she had which reflected her right to admission. She asserted that she did have such documents and presented an I-94 which reflected parole "pursuant to Section 212(d)(5)" effective to July 27, 1990. She also relied upon subsequently issued work authorizations, and she referenced her Egyptian passport as a document she used to cross the border from Canada into this country. Tr. pp. 137 *et seq.*

Applicant's parole was revoked by the District Director of the INS in the charging document herein (Form I-122). Exh. 1. This document was served upon applicant by certified mail on or about November 6, 1991; she received personal service of it on August 5, 1993. Because the parole granted applicant (and reflected in the I-94 which she cited in the December 13, 1995, proceedings) has now been terminated by the individual with jurisdiction over that parole, that document is no longer effective to protect applicant from excludability. The work authorizations previously granted her are equally ineffective. Any such theory was specifically rejected by the BIA in its Order of Remand: "Similarly, we reject the notion that the Service *de facto* extended parole through the applicant's work authorization and that that extension nullified the Notice [Form I-122] issued November 1991." *Order*, p. 4. The BIA also notes that "a grant or extension of work authorization does not convert a parolee into an admittee." *Id.* Finally, there is no basis upon which the Egyptian passport, absent more in the form of some validly issued and unexpired visa, can support admissibility. Applicant's most recent visa is the visitor's visa by which she effected entry in December of 1983. She was authorized to remain in the United States for a temporary period not to exceed June 3, 1984, which period she exceeded without authorization. Thus, she was illegally present

and subject to deportation when, in October of 1989, she departed to Canada with the I-512 in hand. The original visitor's visa has now long since expired. Applicant has, therefore, neither presented nor suggested any document which affords or can be construed to afford her any *prima facie* basis for admission. Applicant, like every alien, is presumed to be an immigrant. INA Section 101 (a)(15). Applicant has made no claim to the contrary. Indeed, it is abundantly clear from her written and oral pronouncements that she desires fervently to reside permanently in this country. The charge of excludability contained in the Form I-122 is that applicant is an immigrant without any valid immigrant visa or sufficient substitute. Applicant's failure to offer any such visa or sufficient substitute constitutes a failure on her part to meet the burdens upon her in these proceedings. The Court therefore finds that the charge of excludability set out in the Form I-122 charging document is sustained by evidence reasonable, substantial, and probative, and applicant is excludable from the United States on that charge.

FURTHER PROCEEDINGS

While both parties have expended considerable energy contesting various issues relating to the availability *vel non* of relief from exclusion, such efforts have been heretofore premature. It is inappropriate to put any obligation upon an alien to declare a binding position on relief unless and until it has been determined judicially that excludability obtains. That prerequisite issue having now been determined adversely to applicant, the question of relief is ripe for consideration. Here, the Court finds the INS motion for determination on the record lacking in merit. Any failure on applicant's part to file relief application(s) in the past is ineffective to foreclose such filing(s) given the premature nature of the requests for such filing(s). Therefore, the INS motion is appropriately denied as to relief issues, and applicant will be given further time, with a definite and binding deadline, to file relief application(s).

ORDER

Accordingly, after review of the entire record in this cause it is upon due consideration thereof

ORDERED that applicant's motion to disqualify Service counsel be and the same is hereby DENIED; and it is further

ORDERED that applicant's motion to disqualify the presently presiding judge be and the same is hereby DENIED; and it is further

ORDERED that applicant's motion for change of venue be and the same is hereby DENIED without prejudice; and it is further

ORDERED that the INS's motion for decision on the record be and the same is hereby GRANTED as to the issue of excludability and DENIED as to other issues; and it is further

ORDERED that should applicant deem herself eligible for any form of relief from exclusion she shall, not later than August 4, 1997, file with this Court and serve upon the INS such application(s) as may be required for the form(s) of relief sought along with supporting documentation. Should applicant seek a form of relief which requires no formal application and/or should she seek to rely upon an application already filed with the Court she shall, not later than the same date, file with the Court and serve upon the INS a written pleading stating the form of such relief sought and the legal basis therefor along with supporting documentation. Should the INS wish to respond by motion, legal brief, or other pleading to whatever is timely filed by applicant, such response shall be filed with the Court and served upon applicant not later than August 22, 1997. Upon review and assessment of the parties' filings, such further proceedings as are necessary will be scheduled by appropriate order, provided that should applicant fail to timely file as required herein she will be deemed by the Court to have waived and abandoned any and all relief to which she might otherwise be entitled and this case will be the subject of a dispositive order without further proceedings.

DONE AND ORDERED this 1st day of July, 1997, at Atlanta, Georgia.

S/G. MacKenzie Rast
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A23 524 000 - Atlanta Date: NOV. 25, 1997

In re: MARIE THERESE HALIM ASSAD

IN EXCLUSION PROCEEDINGS

INTERLOCUTORY APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Keith E. Hunsucker
Assistant District Counsel

ORDER:

PER CURIAM. The appeal is dismissed. The applicant's appeal is interlocutory in nature. This Board does not ordinarily entertain interlocutory appeals. *See Matter of Ruiz-Campuzano,* 17 I&N Dec. 108 (BIA 1979); *Matter of Ku,* 15 I&N Dec. 712 (BIA 1976); *Matter of Sacco,* 15 I&N Dec. 109 (BIA 1974). We have on occasion ruled on the merits of interlocutory appeals where we deemed it necessary to address important jurisdictional questions regarding the administration of the immigration laws or to correct reoccurring problems in the, handling of cases by immigration judges. *See Matter of Amico,* 19 I&N 652 Dec. (BIA 1988); *Matter of Correa,* 19 I&N Dec. 130 (BIA 1984); *Matter of Victorino,* 18 I&N Dec. 259 (BIA 1982); *Matter of Fong,* 14 I&N Dec. 670 (BIA 1974). The same cannot be said of the case before us.[1]

We note that this appeal was timely filed on July 31, 1997, from the July 1, 1997, decision of the Immigration Judge. The Immigration Judge's July 1, 1997, order gave the applicant until August 4, 1997, to file with said Immigration Judge, appropriate application for relief from exclusion. In the absence of the filing of any timely applications for relief, the Immigration Judge would enter a final order. On appeal, the applicant contests the July 1, 1997, decision, which denied her motions to disqualify Immigration and Naturalization Service counsel, to disqualify the presiding judge, to change venue, and ordering applicant to file appropriate applications for relief. Such issues may be appealed after the Immigration Judge has entered a final order. Accordingly, as the instant appeal has not met the above criteria for consideration of an interlocutory appeal, the appeal is dismissed.

S/FOR THE BOARD

1 The petitioner's request for oral argument before the Board is denied. See 8 C.F.R. § 3 1(e)(1997).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
77 Forsyth St., Suite 112
Atlanta, Georgia 30303

File: A23-524-000 **IN EXCLUSION PROCEEDINGS**

In the Matter of: Marie Therese Halim **ASSA'AD**, Applicant.

ON BEHALF OF APPLICANT: Pro Se

ON BEHALF OF SERVICE: Keith E. Hunsucker, Esq.

DECISION AND ORDER

This matter is before the Court as the result of a Form I-122 charging document in which applicant is charged with being excludable as an immigrant without any immigrant visa or sufficient substitute. By previous order, the issues raised in that document have been resolved. For the reasons set out in that order, which are by this reference incorporated herein, this Court finds by evidence of record which is reasonable, substantial, and probative that applicant is excludable on the charge contained in the charging document.

The issue left unresolved by the previous order is whether there is any relief available to applicant which, if granted, will allow applicant to avoid exclusion. In the Court's order determining excludability a schedule was established under the terms of which applicant was to file application(s) for any form(s) of relief which she deemed herself eligible to seek. She was in addition, and/or as an alternative, to file a written pleading setting out the nature of and legal basis for any form of relief for which she deemed herself eligible but for which no application was appropriate. The INS was, in turn, to file any responsive pleading which it deemed appropriate. Both parties submitted filings in response to this schedule. However, before the end of the permitted period, applicant filed with the Board of Immigration Appeals an Interlocutory Appeal of the Court's order. As a result, the Court deferred any further action in this case pending the outcome of that appeal. In due course, applicant's appeal was dismissed. Any interruption by the appeal of the Court's previously established filing schedule has now been cured by the passage of time since the appeal was denied. No further filings have been received from either party. The matter is, therefore, ripe for disposition of unresolved issues.

Applicant's three filings address two and only two forms of relief from exclusion: asylum and adjustment of status. Turning first to asylum, the Court notes that over the history of this case applicant has made repeated oral and written allegations that she as a Christian faces persecution in Egypt. However, she has never filed the I-589 application which is prerequisite to consideration for such relief. Indeed, in her filing of July 31, 1997, she made it explicitly clear that she had "no intent" to file such an application. Thus, notwithstanding applicant's claims of persecutory risk, she is not eligible for an asylum grant which she declines to request.

In applicant's filing of July 10, 1997, she seeks relief in the form of adjustment of status based on any one or all of the three applications for that form of relief which she indicates she filed over time with the INS. In her filing of July 31, 1997, she asserts that this Court is mandated by the unpublished decision of the Fourth Circuit Court of Appeals (case #94-1339) to hear her application for adjustment. No actual Form I-485 has been submitted to the Court for consideration. It appears that applicant filed her first I-485 in 1988 as the unmarried daughter of a lawful permanent resident mother. That application was denied by the INS in October of that year due to her failure to comply with the conditions imposed upon her as an exchange visitor. On October 27, 1989, applicant departed the United States on advance parole. Sometime prior to that departure she sought adjustment through the amnesty program. The last of the three adjustment applications was filed on or about June 25, 1992. The INS apparently claims that if such an application was filed it has been lost.

When applicant departed on October 27, 1989, she was in possession of a Form I-512 duly issued to her on or about September 29, 1989. This document authorized her parole re-entry pursuant to Section 212(d)(5) of the INA. It bore the following remarks: "Issued for Emergency Reasons" and "Prima Facie Eligibility Under I.R.C.A." The document further indicates on its face that applicant arrived at the POE on October 28, 1989, and was paroled into the United States, which parole was effective to July 27, 1990.

Applicant now asserts that this Court has jurisdiction under 8 CFR Sections 254.2(a) [sic.] and 236.4 to hear and rule upon her adjustment applications. (Her reference to Section 254 is apparently

a typographical error and/or an inadvertent transposition of numbers where the intent was to cite Section 245.) Sections 245.2(a) and 236.4 of 8 CFR, do establish this Court's jurisdiction over adjustment in the exclusion context. That jurisdiction is, however, quite limited, and neither applicant nor a circuit court of appeals can expand it beyond its stated limits. The same limitations are set out in both sections in identical language. In short, this Court can hear adjustment applications only where: (1) the I-485 was previously filed (subsequent to the applicant's inspection and admission) and pending when the applicant departed the United States, and (2) the applicant has been by Form I-512 paroled back into this country for the express purpose of pursuing the pre-existing and pending I-485, and (3) that I-485 is denied after the parole-return. The first two requirements are express; the third is implied. One cannot be paroled into the country expressly to pursue an application (I-485) which is no longer pending because it was denied prior to one's departure. No I-512 would issue under such circumstances.

In this case, none of applicant's applications for adjustment meet the requirements for jurisdiction.

Her 1988 application as an unmarried daughter of a lawful permanent resident was filed prior to her parole-authorized absence and return. However, it was also denied well prior to that absence and return. Thus, it was not pending at the time of her absence and return. Furthermore, the I-512 issued to applicant makes no reference to any pending I-485 (or any pending application for adjustment under Section 245, INA). Rather, the I-512 on its face indicates that parole was granted in connection with I.R.C.A. Therefore, this I-485 does not qualify as one over which this Court can exercise jurisdiction.

Applicant's claim for adjustment under the I.R.C.A. legislation is similarly beyond this Court's jurisdiction. The Immigration Courts have never had jurisdiction in any form or in any context over such claims. To the contrary, this Court is prohibited from any access to her application for such relief.

The last application for relief which applicant claims to have filed with the INS was submitted in 1992. Since her parole-authorized absence and return occurred in 1989, it is self-evident that this application was not and could not have been

pending contemporaneously with her I-512. Her parole could not be for the purpose of pursuing this application. Thus, this application is also beyond the jurisdiction of this Court.

The regulatory language presently in effect is an accommodation of the reform legislation known as IIRIRA. The present version of 8 CFR modifies the sections cited above some in form, but none in substance. For example, 8 CFR Section 245.2(a) continues to state the same jurisdictional requirements, but it now applies only in the context of removal proceedings. Section 236.4 now addresses a totally different subject matter. The jurisdictional requirements previously set out there are now contained in Section 240.34 in unchanged form. Thus, whether addressed in terms of the regulatory language in place when this case first arose or in terms of the present regulatory language, analysis yields the same results.

Applicant has submitted no application(s) for relief. Instead, she relies upon applications previously submitted to the INS. However, none of those applications are within the limits of the very narrow jurisdiction granted this Court over adjustment cases in the exclusion context; none of them are cognizable in this exclusion case. Thus, there is no form of relief for which applicant claims eligibility which it is within the power of this Court to grant.

Accordingly, after review of the entire record in this cause, it is, upon due consideration thereof:

ORDERED that applicant's requests for adjustment of status be and the same are hereby mandatorily DENIED for want of jurisdiction, and it is further

ORDERED that applicant be excluded and deported from the United States.

DONE AND ORDERED this the 24th day of March, 1998, at Atlanta, Georgia.

S/ G. McKenzie Rast
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A 23 524 000 - Atlanta Date: AUG 27 2001

In re: MARIE THERESE HALIM ASSA'AD
a.k.a. Marie-Therese Halim Assa'ad-Faltas

IN EXCLUSION PROCEEDINGS **APPEAL**

ON BEHALF OF APPLICANT: Pro se

ON BEHALF OF SERVICE: Keith E. Hunsucker,
Assistant District Counsel

EXCLUDABLE: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)]
Immigrant— no valid immigrant visa or entry document

APPLICATION: Termination of proceedings; adjustment of status

This case was previously before the Board, which issued an order on December 20, 1996, reversing an Immigration Judge's decision to terminate these exclusion proceedings. The applicant, a native and citizen of Egypt, has appealed[1] from the decisions of an Immigration Judge dated July 1, 1997, and March 24,1998, finding the applicant excludable as charged and ineligible for any form of relief from exclusion. The applicant's appeal will be dismissed. Her request for oral argument is denied. Her request to certify this case to the Attorney General is also denied.

The extensive procedural history of this matter was set forth in our December 20,1996 order and need not be repeated here. In essence, the applicant is contending that the Board and the Immigration Judge erred in allowing these proceedings to go forward. As we determined in our decision dated December 20, 1996, and for the reasons stated in the Immigration Judge's decision dated July 1, 1997, as well as for the reasons stated below, we find that the applicant is properly in exclusion proceedings.

The applicant's Authorization for Parole of an Alien Into the United States (Form I-512), granted on September 29,1989, clearly indicates that the applicant was paroled into the United States under the authority of section 212(d)(5)(A) of the Act. That section specifically provides as follows:

> such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in

1 The applicant's request for a waiver of the filing fee is hereby granted.

the same manner as that of any other applicant for admission to the United States.

Neither the Attorney General, nor the district director as his delegatee, has authority under law to admit an alien into this country unless the law authorizes such admission. See section 212(a) of the Act. In this case there was no statutory authority and the regulations did not create such authority that would have allowed the applicant to leave the United States and be readmitted into this country upon her return when at the time of her return she could not establish that she was admissible under controlling law. There is absolutely no indication in the record that the applicant was admissible at the time of her return to the United States in 1989. Absent readmission, as opposed to parole under section 212(d)(5)(A) of the Act, the applicant had no right to have her status tested in deportation proceedings. *See Matter of Torres*, 19 I&N Dec. 371, 373 (BIA 1986), and cases cited therein. Thus, under the express language of the Act, the applicant was properly placed in exclusion proceedings when her parole was terminated. As the applicant did not have a valid visa or entry document upon her return to the United States in 1989, we find that she is properly excludable as charged.

On appeal, the applicant argues that she should not be subject to exclusion proceedings. She states that when she left and returned to the United States in October 1989, her trip was brief, casual, and innocent, and that as a legalization applicant she could not be considered a parolee under section 212(d)(5)(A) of the Act. Instead, she argues, she should be considered under the *Fleuti* doctrine as having never left the United States. When the Service granted her advance parole under 8 C.F.R. § 245a.2(n)(2)(i), she contends, it was in fact giving her trip *Fleuti* status in advance so that she could not be placed in exclusion proceedings after her return. The applicant cites the Ninth Circuit Court of Appeal's decision in *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270 (9th Cir. 1996), to support this argument.

Aside from the fact that *Espinoza* does not apply to this case as this case does not arise in Ninth Circuit, *see Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989), *Espinoza* is clearly distinguishable on its facts. That case involved an alien who departed the United States with a legalization application pending without having first sought advance parole and who was then placed in exclusion proceedings immediately upon his return.

The court found that in the case of a legalization applicant who departs the United States without a grant of advance parole, if that alien's trip was brief, casual, and innocent, he is entitled to be readmitted to the United States. The court also found that the regulations that require legalization applicants to receive advance parole before leaving the country were invalid.

As opposed to the alien in *Espinoza*, the instant applicant sought and attained advance parole under the provisions of 8 C.F.R. §212.5(e) before her trip out of the United States, *see* 8 C.F.R. §245a.2(n)(2)(i), and was expressly paroled into the United States pursuant to section 212(d)(5)(A) of the Act upon her return. The court in *Espinoza* did not hold that advance parole may no longer be granted by the Service to legalization applicants, as evidenced by this statement:

> [w]e do not invalidate 8 C.F.R. §245a.2(n)(2)(i), which provides that the INS may grant advance parole to legalization applicants. Many legalization applicants may prefer to have advance permission from the INS knowing that there will not be any immigration concerns upon their return. We only invalidate those statutes that *require* advance parole, but we do not foreclose the *option* of advance parole.

94 F.3d at 1277, n. 4.

We find it significant that 8 C.F.R. §245a.2(n)(2)(i) specifically refers to 8 C.F.R. §212.5(e), a provision within the general parole regulations, as the provision which should be followed in granting a legalization applicant advance parole. By not invalidating this provision, and by not giving any other indication that it intended to modify the effect of a grant of advance parole for legalization applicants so that such applicants would be accorded *Fleuti* status and thus avoid exclusion proceedings, *Espinoza* left in place the statutory and regulatory scheme that subjects parolees (including legalization applicants) to exclusion proceedings when their parole is terminated. We do not interpret the court's statement that legalization applicants may seek advance parole to avoid "any immigration consequences" to express a view that a grant of advance parole prevents an alien from being placed in exclusion proceedings. Such a reading is plainly inconsistent with the statute and regulations.

We also adopt the Immigration Judge's decision dated March 24, 1998, finding that the applicant is ineligible for any form of

relief from exclusion. As neither this Board nor the Immigration Judge has the authority to adjudicate the applicant's adjustment applications in exclusion proceedings, we need not address the applicant's arguments concerning the 2-year foreign residency requirement associated with her J-1 visa as those arguments if successful would only affect her eligibility for adjustment of status.

We also adopt the Immigration Judge's determination made in his decision dated July 1, 1997, concerning the disqualification of the Atlanta District Counsel and the Service attorneys who work under such Counsel for the reasons stated in the Immigration Judge's decision. We find that the applicant's citation of 8 C.F.R. §3.1(d)(3) (1995),[2] to support her argument that the Immigration Judge had the power to disqualify the Atlanta District Counsel and his attorneys, is inapposite as such regulation addresses the powers of the Board, not the Immigration Judge.

Finally, we adopt the Immigration Judge's determination made in his decision dated July 1,1997, regarding the applicant's request that the Immigration Judge recuse himself. The Immigration Judge made it clear that he did not deem the applicant's mental health status at all relevant to the instant proceedings, and to the extent the applicant is concerned that the Immigration Judge will pass judgment on such when she appears personally before him, that has not, as of yet, happened and, in light of our determination, is not likely to happen in the future.

With regard to the applicant's remaining arguments on appeal, we either do not have the authority to address them, they have already been addressed in our decision dated December 20, 1996, or we need not address them in light of our current disposition of this case.[3] Accordingly, in light of the above, the applicant's appeal will be dismissed.

ORDER: The applicant's appeal is dismissed.

S/FOR THE BOARD

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[2] The applicant's citation to 8 C.F.R. §3.1(d)(ii)(3) appears to be a technical error.

[3] On appeal, the applicant seems to claim that we in fact issued our decision dated December 20,1996, in March of 1996 or before, thereby issuing a decision before the transcript was prepared and without the benefit of the applicant's brief. *See* April 20, 1998, Brief of Applicant at 2. However, the applicant fails to submit any evidence to support this assertion, and we will, therefore, not consider it any further.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A23 524 000 - Atlanta Date JAN-7 2002

In re MARIE THERESE HALIM ASSA'AD
a.k.a. Marie-Therese Halim Assa'ad-Faltas

IN EXCLUSION PROCEEDINGS **APPEAL**

ON BEHALF OF APPLICANT: Pro se

ON BEHALF OF SERVICE: Keith E. Hunsucker
Assistant District Counsel

EXCLUDABLE: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. §1182(a)(7)(A)(i)(I)] Immigrant - no valid immigrant visa or entry document

APPLICATION: Reconsideration

The applicant filed a motion to reconsider with the Board on September 18, 2001. We have jurisdiction over this matter pursuant to 8 C.F.R. §3.2. The motion and request to certify this proceeding to the Attorney General will be denied.

The record reflects that on August 27, 2001, the Board dismissed an appeal of an Immigration Judge's decision which found that the applicant was excludable from the United States and ineligible for relief from exclusion and deportation. The applicant requested reconsideration of that decision.

Pursuant to 8 C.F.R. §3.2(b), a motion to reconsider shall state the reasons for the motion by specifying the errors in fact or law in the prior Board decision and shall be supported by pertinent authority. We have reviewed the contentions raised in the applicant's motion, but find that our previous decision in these proceedings was correct. Consequently, we cannot find based upon the record which was before us when we last considered these proceedings that an error of fact or law exists in our prior decision.

Accordingly, the following order will be entered.

ORDER: The applicant's motion to reconsider is denied.

S/FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR TIE FOURTH CIRCUIT

No. 01-2125
A23-524-000

FILED
October 22, 2001

MARIE THERESE HALIM ASSA'AD,
a/k/a Marie-Therese Halim Assa'ad-Faltas Petitioner
v.
U.S. IMMIGRATION & NATURALIZATION SERVICE;
JOHN ASHCROFT, Attorney General Respondents

ORDER

The petitioner has filed a motion for stay pending review, the respondents filed a response in opposition and a motion to dismiss, or in the alternative to suspend briefing pending transfer of the petition for review. The petitioner filed a response to the motion. The Court denies the motion for stay and the motion to dismiss and transfers this case to the United States Court of Appeals for the Eleventh Circuit.

Entered at the direction of Judge Williams, with the concurence of Judge Motz and Judge Traxler.

For the Court /s/ Patricia S. Connor, CLERK

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No. 02-3151

FILED **JUN 19 2002**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

MARIE THERESE HALIM ASSA'AD, also known
as Marie Therese Halim Assa'ad-Faltas, Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Before: KRUPANSKY and COLE Circuit Judges; DUGGAN* District Judge.

This matter is before the court upon consideration of the motion of the respondent to dismiss this petition for review or, in the alternative, to transfer it to the United States Court of Appeals for the Eleventh Circuit. The Petitioner failed to respond.

A review of the documents before the court indicates that the Board of Immigration Appeals ordered petitioner deported following proceedings in Atlanta, Georgia. Reconsideration of that decision was denied. Petitioner filed a petition for review in this court. However, this court does not have jurisdiction over the Georgia decision. Accordingly, it is ordered that the case is transferred to the United States Court of Appeals for the Eleventh Circuit as provided by 28 U.S.C. § 1631.

ENTERED BY ORDER OF THE COURT /s/ Clerk

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* The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

[Attachment B to Respondents' Supplemental Brief]
[faxed from ATL (404) 331 6875 on DEC-10-2002, 11:48]

FILE: A91 158 379 Southern Service Center (XPS)
IN RE: Applicant: Marie-Therese ASSAD-FALTAS
APPLICATION: Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. 1255a
IN BEHALF OF APPLICANT: Self-represented

This matter is an application for temporary resident status denied by the Director, Southern Regional Processing Facility, which is before the Legalization Appeals Unit on appeal. The appeal will be dismissed.

DISCUSSION: The director denied the application because the applicant was an exchange visitor subject to the two-year foreign residence requirement of section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(e), who had neither fulfilled nor received a waiver of this requirement. On appeal, the applicant stated that she received a "NO OBJECTION WAIVER" from her home country and that she was no longer subject to the foreign residence requirement. In addition, she asserted that she was out of status from August 1980 through February 1981 because her IAP-66 Form, which was sent to the Service on September 9, 1980, was not adjudicated until February 13, 1981.

An applicant for temporary residence who entered the United States as a nonimmigrant before January 1, 1982 must establish that the period of authorized stay as a nonimmigrant expired before such date through the passage of time or that the alien's unlawful status was known to the Government as of such date. Section 245A(a)(2) of the Act, 8 U.S.C. 1255a(a)(2). In addition, an applicant who at any time during her stay in the United States was an exchange visitor as defined in section 101(a)(15)(J) of the Act, 8 U.S.C. 1101(a)(15)(J), must establish that she is not subject to the two-year foreign residence requirement of section 212(e) or that she has fulfilled the requirement or received a waiver thereof. 8 C.F.R. 245a.2(b)(4).

In the instant case, the applicant entered the United States on August 22, 1979 as a J-1 nonimmigrant exchange visitor and remained in lawful J-1 status through May 31, 1982. Although the applicant has not furnished a copy of her original passport or Form I-94, the record contains copies of Form IAP-66 and IAP-66A for the following periods of time:

(1) 8/10/80 - 8/9/81;
(2) 8/10/81 - 12/31/81;
(3) 12/31/81 - 5/31/82; and
(4) 7/15/85 - 7/14/86.

A nonimmigrant alien defined in section 101(a)(15)(J) of the Act applies for an extension of stay on Form IAP-66. 8 C.F.R. 214.1(3)(c). With the exception of the form for the period 7/15/85 - 7/14/86, all of the above-noted IAP-66A forms reflect Service authorization stamps extending the applicant's authorized stay in J-1 status for the period of time noted. The applicant was, therefore, clearly in authorized J-1 status on January 1, 1982.

The applicant's claim on appeal that she is not subject to the § 212(e) foreign residence requirement is erroneous. The foreign residence requirement may be waived for an exchange visitor by the Attorney General, upon the favorable recommendation of the United States Information Agency (USIA), if the country of the visitor's nationality or last legal permanent residence furnishes the USIA with a written statement that it has no objection to the granting of such a waiver. See 8 C.F.R. 212.7(c)(10). "No Objection" statements must be sent through official diplomatic channels, i.e., from the country's foreign office or the chief mission in the form of a diplomatic note. See 22 C.F.R. 514.31(c)(2).

The document which the applicant has submitted as a "NO OBJECTION WAIVER" is Not and does not resemble the "No Objection" statement referred to in the preceding paragraph. Rather, it is a statement by the Egyptian Personnel Affairs Department terminating the applicant's service due to absence from work.

There is no evidence of record that the applicant received a section 212(e) waiver or that she ever initiated the waiver process. Moreover, the applicant has failed to demonstrate that her authorized stay in the United States in J-1 status expired prior to January 1, 1982 or that she was otherwise in an unlawful status which was known to the Government as of that date. Consequently, the applicant is ineligible for the benefits sought.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.

DATED: 17 FEB 1992

FOR THE ASSOCIATE COMMISSIONER, EXAMINATIONS
/S/ for Andrea J. Quarantillo, Director
Legalization Appeals Unit

COEXM:MMULREAN;mr;MULI
02/14/92:A91158379:376-2052

FILED
SEPTEMBER 26, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 01-16153 and 02-13474

MARIE THERESE HALIM ASSA'AD, Petitioner,
versus
UNITED STATES ATTORNEY GENERAL,
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Petitions for Review of Final Orders
of the Board of Immigration Appeals

ON PETITION(S) FOR REHEARING
AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____ F.2d ____).
Before: ANDERSON, BIRCH and BARKETT, Circuit Judges.
PER CURIUM:
The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
s/ R. Lanier Anderson
UNITED STATES CIRCUIT JUDGE

1. Provisions of the Constitution of the United States

ARTICLE I

Section 8. [1] The Congress shall have Power ... [4] To establish an uniform Rule of Naturalization ... throughout the United States;

*****

Section 9. [1] The Migration or Importation of such Persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, ...

ARTICLE II

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; ... he shall take Care that the Laws be **faithfully** executed, and shall Commission all the Officers of the United States.

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

*****

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;....

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the ...judicial Proceedings of every other State.

ARTICLE VI

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;....

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *****

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2. Treaties

The Preamble and Article 10, Section 1, of the **INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS,** provide:

> The State Parties to the present Covenant, ... Recognizing that these rights derive from the inherent dignity of the human person, ... recognize that [t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental unit of society[.]

The Final Act of the Conference on Security and Co-operation in Europe (Helsinki Accord), in Article IV, Section 1(a), provides:

> [T]he participating States will favourably consider applications for travel with the purpose of allowing persons to enter or leave their territory temporarily, and on a regular basis if desired, in order to visit members of their families. Applications for temporary visits to meet members of their families will be dealt with without distinction as to the country of origin or destination: existing requirements for travel documents and visas will be applied in this spirit. The preparation and issue of such documents and visas will be effected within reasonable time limits; cases of urgent necessity—such as serious illness or death—will be given priority. They will take such steps as may be necessary to ensure that the fees for official travel documents and visas are acceptable.
>
> They confirm that **the presentation of an application concerning contacts on the basis of family ties *will not modify the rights and obligations of the applicant or of members of his family.*** [emphasis added]

3. Statutes

A. From 100 Stat. 3384, P.L. 99-603 (6 November 1986):

SEC. 115. ENFORCEMENT OF THE IMMIGRATION LAWS OF THE UNITED STATES.

It is the sense of the Congress that—

(1) the immigration laws of the United States should be enforced vigorously and uniformly, and

(2) in the enforcement of such laws, the Attorney General shall take due and deliberate actions necessary to safeguard the constitutional rights, personal safety, and human dignity of United States citizens and aliens.

B. Provisions of Title 8 of the United States Code

[§ 1182] (d) Temporary admission of *nonimmigrants*:

(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions *as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest* any alien *applying for admission* to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned *to the custody* from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title. [emphasis added] ***

(e) Educational visitor status; foreign residence requirement; waiver

No person admitted under section 1101(a)(15)(J) of this title or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 1101(a)(15)(J) of this title was a national or resident of a country which the Director of the United States Information Agency, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 1101(a)(15)(H) or section 1101(a)(15)(L) of this title until it is established that such person has resided and

been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: *Provided*, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest ....

* * * * *

§1255. Adjustment of status of nonimmigrant to that of person admitted for permanent residence

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa

The status of an alien who was inspected and admitted or paroled into the United States or the status or of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 1154(a)(1) of this title may be adjusted by the Attorney General in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

* * * * *

(c) Alien[s] ... continuing or accepting unauthorized employment, and aliens admitted in transit without visa

Other than an alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (A)(v), (A)(vi), (B)(ii), (B)(iii). or (B)(iv) of section 1154(a)(l) of this title, subsection (a) of this section shall not be applicable to (1) an alien crewman; (2) subject to subsection (k) of this section, an alien (other than an imme-

diate relative as defined in section 1151(b) of this title or a special immigrant described in section 1101(a)(27)(H), (I), (J). or (K) of this title) who hereafter continues in or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States; (3) any alien admitted in transit without visa under section 1182(d)(4)(C) of this title; (4) an alien (other than an immediate relative as defined in section 1151(b) of this title) who was admitted as a nonimmigrant visitor without a visa under section 1182(l) of this title or section 1187 of this title; (5) an alien who was admitted as a nonimmigrant described in section 1101(a)(15)(S) of this title; (6) an alien who is deportable under section 1227(a)(4)(B) of this title; (7) any alien who seeks adjustment of status to that of an immigrant under section 1153(b) of this title and is not in a lawful nonimmigrant status; or (8) any alien who was employed while the alien was an unauthorized alien, as defined in section 1324a(h)(3) of this title, or who has otherwise violated the terms of a nonimmigrant visa. ***

(i) Adjustment of status of certain aliens physically present in United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States—

(A) who– (i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of—

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classifica-

tion, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application, ...

(2) Upon receipt of such application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if—

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed. * * * * *

§1255a. Adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful permanent residence

(a) Temporary Resident status

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien meets the following requirements:

(1) Timely application

(A) During application period—Except as provided in subparagraph (B), the alien must apply for such adjustment during the 12-month period beginning on a date (not later than 180 days after November 6, 1986) designated by the Attorney General.

(B) Application within 30 days of show-cause order — An alien who, at any time during the first 11 months of the 12-month period described in subparagraph (A), is the subject of an order to show cause issued under section 1252 of this title (as in effect before October 1. 1996), must make application under this section not later than the end of the 30-day period beginning either on the first day of such 12-month period or on the date of the issuance of such order, whichever day is later.

(C) Information included in application — Each application under this subsection shall contain such information as the Attorney General may require, including information on living relatives of the applicant with respect to whom a petition for preference or other status may be filed by the applicant at any later date under section 1154(a) of this title.

(2) Continuous unlawful residence since 1982

(A) In general – The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.

(B) Nonimmigrants – In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.

(C) Exchange visitors – If the alien was at any time a nonimmigrant exchange alien (as defined in section 1101(a)(15)(J) of this title), the alien must establish that the alien was not subject to the two-year foreign residence requirement of section 1182(e) of this title or has fulfilled that requirement or received a waiver thereof.

(3) Continuous physical presence since November 6, 1986

(A) In general– The alien must establish that the alien has been continuously physically present in the United States since November 6, 1986.

(B) Treatment of brief, casual, and innocent absences– An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States.

(C) Admissions – Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection.

(4) Admissible as immigrant

The alien must establish that he–

(A) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section,

(B) has not been convicted of any felony or of three or more misdemeanors committed in the United States,

(C) has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion, and

(D) is registered [for] Military ... Service ... if ... required [by] Act.

For purposes of this subsection, an alien in the status of a Cuban and Haitian entrant [...] shall be considered to have entered the United States and to be in an unlawful status in the United States.

(b) Subsequent adjustment to permanent residence and nature of temporary resident status

(1) Adjustment to permanent residence

The Attorney General shall adjust the status of any alien provided lawful temporary resident status under subsection (a) of this section to that of an alien lawfully admitted for permanent residence if the alien meets the following requirements:

(A) Timely application after one year's residence – The alien must apply for such adjustment during the 2-year period beginning with the nineteenth month that begins after the date the alien was granted such temporary resident status.

(B) Continuous residence

(i) In general – The alien must establish that he has continuously resided in the United States since the date the alien was granted such temporary resident status.

(ii) Treatment of certain absences – An alien shall not be considered to have lost the continuous residence referred to in clause (i) by reason of an absence from the United States permitted under paragraph (3)(A)

(C) Admissible as immigrant * * * * *

(D) Basic citizenship skills * * * * *

(i) In general * * * * *

(ii) Exception for elderly or develop mentally disabled individuals * * * * *

(iii) Relation to naturalization examination * * * * *

(2) Termination of temporary residence * * * * *

(3) Authorized travel and employment during temporary residence

During the period an alien is in lawful temporary resident status granted under subsection (a) of this section—

(A) Authorization of travel abroad – The Attorney General shall, in accordance with regulations, permit the alien to return to the United States after such brief and casual trip abroad as reflect an intention on the part of the alien to adjust to lawful permanent resident status under paragraph (1) and after brief temporary trips abroad occasioned by a family obligation involving an occurrence such as the illness or death of a close relative or other family need.

(B) Authorization of employment – The Attorney General shall grant the alien authorization to engage in employment in

the United States and provide to that alien an "employment authorized" endorsement or other appropriate work permit.

(c) Applications for adjustment of status

(1) To whom may be made

The Attorney General shall provide that applications for adjustment of status under subsection (a) of this section may be filed—(A) with the Attorney General, or

(B) with a qualified designated entity, but only if the applicant consents to the forwarding of the application to the Attorney General.

As used in this section, the term "qualified designated entity" means an organization or person designated under paragraph (2).

(2) Designation of qualified entities to receive applications

For purposes of assisting in the program of legalization provided under this section, the Attorney General—

(A) shall designate qualified voluntary organizations and other qualified ... organizations, and

(B) may designate such other persons as the Attorney General determines are qualified [for] the preparation and submittal of applications for adjustment of status ...

(3) Treatment of applications by designated entities * * * * *

(4) Limitation on access to information

Files and records of qualified designated entities relating to an alien's seeking assistance or information with respect to filing an application under this section are confidential and the Attorney General and the Service shall not have access to such files or records relating to an alien without the consent of the alien.

(5) Confidentiality of information

(A) In general—Except as provided in this paragraph, neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof may—

(i) use the information furnished by the applicant pursuant to an application filed under this section for any purpose other than to make a determination on the application, for enforcement of paragraph (6), or for the preparation of reports to Congress under section 404 of the Immigration Reform and Control Act of 1986;

(ii) make any publication whereby the information furnished by any particular applicant can be identified; or

(iii) permit anyone other than the sworn officers and employees of the Department or bureau or agency or, with respect to applications filed with a designated entity, that designated entity, to examine individual applications.

(B) Required disclosures

The Attorney General shall provide the information furnished under this section, and any other information derived from such furnished information, to a duly recognized law enforcement entity in connection with a criminal investigation or prosecution, when such information is requested in writing by such entity, or to an official coroner for purposes of affirmatively identifying a deceased individual ....

(C) Authorized disclosures – The Attorney General may provide, in the Attorney General's discretion, for the furnishing of information furnished under this section in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under section 8 of title 13.

(D) Construction

(i) In general – Nothing in this paragraph shall be construed to limit the use, or release, for immigration enforcement purposes or law enforcement purposes of information contained in files or records of the Service pertaining to an application filed under this section, other than information furnished by an applicant pursuant to the application, or any other information derived from the application, that is not available from any other source.

(ii) Criminal convictions – Information concerning whether the applicant has at any time been convicted of a crime may be used or released for immigration enforcement or law enforcement purposes.

(E) Crime–Whoever knowingly uses, publishes, or permits information to be examined in violation of this paragraph shall be fined not more than $10,000.

(6) Penalties for false statements in applications

Whoever files an application for adjustment of status under this section and knowingly and willfully falsifies, misrepresents, conceals, or covers up a material fact or makes any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) Application fees * * * * *

(A) Fee schedule * * * * *

(B) Use of fees * * * * *

(C) Immigration-related unfair employment practices * * * * *

(d) Waiver of numerical limitations and certain grounds for exclusion

(1) Numerical limitations do not apply – The numerical limitations of sections 1151 and 1152 of this title shall not apply to the adjustment of aliens to lawful permanent resident status under this section.

(2) Waiver of grounds for exclusion – In the determination of an alien's admissibility under subsections (a)(4)(A), (b)(1)(C)(i), and (b)(2)(B) of this section–

(A) Grounds of exclusion not applicable – The provisions of paragraphs (5) and (7)(A) of section 1182(a) of this title shall not apply.

(B) Waiver of other grounds

(i) In general – Except as provided in clause (ii), the Attorney General may waive any other provision of section 1182(a) of this title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

(ii) Grounds that may not be waived – The following provisions of section 1182(a) of this title may not be waived by the Attorney General under clause (i):

(I) Paragraphs (2)(A) and (2)(B) (relating to criminals).

(II) Paragraph (2)(C) (relating to drug offenses), except for so much of such paragraph as relates to a single offense of simple possession of 30 grams or less of marijuana.

(III) Paragraph (3) (relating to security ... grounds).

(IV) Paragraph (4) (relating to aliens likely to become public charges) insofar as it relates to an application for adjustment to permanent residence.

Subclause (IV) ([...]) shall not apply to an alien who is or was an aged, blind, or disabled individual (as defined in section 1614(a)(1) of the Social Security Act....

(iii) Special rule for determination of public charge * * * * *

(C) Medical examination – The alien shall be required, at the alien's expense, to undergo such a medical examination (including a determination of immunization status) as is appropriate and conforms to generally accepted professional standards of medical practice.

(e) Temporary stay of deportation and work authorization for certain applicants

(1) Before application period – The Attorney General shall provide that in the case of an alien who is apprehended before the

beginning of the application period described in subsection (a)(1)(A) of this section and who can establish a prima facie case of eligibility to have his status adjusted under subsection (a) of this section (but for the fact that he may not apply for such adjustment until the beginning of such period), until the alien has had the opportunity during the first 30 days of the application period to complete the filing of an application for adjustment, the alien—

(A) may not be deported, and

(B) shall be granted authorization to engage in employment in the United States and be provided an "employment authorized" endorsement or other appropriate work permit.

(2) During application period – The Attorney General shall provide that in the case of an alien who presents a *prima facie* application for adjustment of status under subsection (a) of this section during the application period and until a final determination on the application has been made in accordance with this section, the alien –

(A) may not be deported, and

(B) shall be granted authorization to engage in employment in the United States and be provided an "employment authorized" endorsement or other appropriate work permit.

(f) Administrative and judicial review

(1) Administrative and judicial review – There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) No review for late filings – No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

(3) Administrative review

(A) Single level of administrative appellate review – The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described in paragraph (1).

(B) Standard for review – Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the applica-

tion and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

(4) Judicial review

(A) Limitation to review of deportation – There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title (as in effect before October 1, 1996).

(B) Standard for judicial review – Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

(C) Jurisdiction of courts – Notwithstanding any other provision of law, no court shall have jurisdiction of any cause of action or claim by or on behalf of any person asserting an interest under this section unless such person in fact filed an application under this section within the period specified by subsection (a)(1) of this section, or attempted to file a complete application and application fee with an authorized legalization officer of the Service but had the application and fee refused by that officer.

(g) Implementation of section

(1) Regulations – The Attorney General, after consultation with the Committees on the Judiciary of the House of Representatives and of the Senate, shall prescribe –

(A) regulations establishing a definition of the term "resided continuously," as used in this section, and the evidence needed to establish that an alien has resided continuously in the United States for purposes of this section, and

(B) such other regulations as may be necessary to carry out this section.

(2) Considerations – In prescribing regulations described in paragraph (1)(A)–

(A) Periods of continuous residence – The Attorney General shall specify individual periods, and aggregate periods, of absence from the United States which will be considered to break a period of continuous residence in the United States and shall take into account absences due merely to brief and casual trips abroad.

(B) Absences caused by deportation or advanced parole – The Attorney General shall provide that –

(i) an alien shall not be considered to have resided continuously in the United States, if, during any period for which continuous residence is required, the alien was outside the United States as a result of a departure under an order of deportation, and

(ii) any period of time during which an alien is outside the United States pursuant to the advance parole procedures of the Service shall not be considered as part of the period of time during which an alien is outside the United States for purposes of this section.

(C) Waivers of certain absences – The Attorney General may provide for a waiver, in the discretion of the Attorney General, of the periods specified under subparagraph (A) in the case of an absence from the United States due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

(D) Use of certain documentation – The Attorney General shall require that –

(i) continuous residence and physical presence in the United States must be established through documents, together with independent corroboration of the information contained in such documents, and

(ii) the documents provided under clause (i) be employment-related if employment related documents with respect to the alien are available to the applicant.

(3) Interim final regulation – Regulations prescribed under this section may be prescribed to take effect on an interim final basis if the Attorney General determines that this is necessary in order to implement this section in a timely manner.

(h) Temporary disqualification of newly legalized aliens from receiving certain public welfare assistance * * * * *

(1) In general * * * * *

(2) Exceptions * * * * *

(3) Restricted Medicaid benefits * * * * *

(A) Clarification of entitlement * * * * *

(B) Restriction of benefits * * * * *

(i) Limitation to emergency services and services for pregnant women * * * * *

(ii) No restriction for exempt aliens and children * * * * *

(C) Definition of medical assistance * * * * *

(4) Treatment of certain programs * * * * *

(5) Adjustment not affecting Fascell-Stone benefits * * * * *

(i) Dissemination of information on legalization program

Beginning not later than the date designated by the Attorney General under subsection (a)(1)(A) of this section, the Attorney General, in cooperation with qualified designated entities, shall broadly disseminate information respecting the benefits which aliens may receive under this section and the requirements to obtain such benefits.

* * * * *

§1324b. Unfair immigration-related employment practices

(a) Prohibition of discrimination based on national origin or citizenship status—

(1) General rule

It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a (h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—

(A) because of such individual's national origin, or

(B) in the case of a citizen or intending citizen (as defined in paragraph (3)), because of such individual's citizenship status.

(2) Exceptions—Paragraph (1) shall not apply to—

(A) a person or other entity that employs three or fewer employees,

(B) a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 703 of the Civil Rights Act of 1964, or

(C) discrimination because of citizenship status which is otherwise required in order to comply with law, regulation or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

(3) "Protected individual" defined

As used in paragraph (1), the term "citizen or intending citizen" means an individual who—

(A) is a citizen or national of the United States, or

(B) is an alien who is lawfully admitted for permanent resi-

dence, is granted the status of an alien lawfully admitted for temporary residence under section 245A(a)(1), is admitted as a refugee under section 207, or is granted asylum under section 208, ...

(4) Additional protection providing right to prefer equally qualified citizens * * * * *

(5) Prohibition of intimidation or retaliation * * * * *

(6) Treatment of certain documentary practices as employment practices

A person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).

4. Provisions of Title 8 of the Code of Federal Regulations

[with italics in original titles but added in texts]

§212.5(e) [(1993), §212.5(f) (2002)] *Advance authorization.* When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued Form I-512

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§245.2(a)(4) [(2002)] *Effect of departure*— (i) *General.* The effect of a departure from the United States is dependent upon the law under which the applicant is applying for adjustment of status.

(ii) *Under section 245.* ... The departure of an applicant who is not under deportation proceedings shall be deemed an abandonment of his or her application constituting grounds for termination, *unless the applicant was previously granted advance parole by the Service for such absence,* and was inspected upon returning to the United States. No alien granted advance parole and inspected upon return shall be entitled to a deportation hearing.

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But 8 CFR §245a.2(l)(2), (m)(1) and (n)(2)(i) (1993), provide:

(l)(2) A brief, casual and innocent absence means a departure authorized by the Service (advance parole) subsequent to May 1, 1987 of not more than (30) days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien's control.

(m)(1) During the time period from the date that an alien's application establishing *prima facie* eligibility for temporary resident status is reviewed at a Service Legalization Office and the date status as a temporary resident is granted, the alien applicant can only be *readmitted* to the United States provided his or her departure was authorized under the Service's advance parole provisions contained in §212.5(e) of this chapter.

(n)(2) Employment and travel authorization prior to the granting of temporary resident status.

(i) .... Permission to travel abroad may be granted in emergent circumstances in accordance with the Service's advance parole provisions contained in §212.5(e) of this chapter after an interview has been conducted in connection with an application establishing *prima facie* eligibility for temporary resident status.

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§245a.13 [(2002)] (e) *Travel while the application is pending.* This paragraph is authorized by section 1104(c)(3) of the LIFE Act relating to the ability of an alien to travel abroad and return to the United States while his or her LIFE Legalization adjustment application is pending. Parole authority is granted to the Missouri Service Center Director for the purposes described in this section and may only be exercised pursuant to the standards prescribed in section 212(d)(5) of the Act. Nothing in this section shall preclude an applicant for adjustment of status under LIFE Legalization from being granted LIFE Legalization or admission into the United States under any other provision of law or regulation for which the alien may be eligible.

(1) An applicant for LIFE Legalization benefits applying from the United States should file with his or her application for adjustment a Form I-131, Application for Travel Document, with fee as set forth in §103.7(b)(1) of this chapter. The Service shall approve the Form I-131 and issue an advance parole document, unless the Service finds that the alien's application does not establish a *prima facie* claim to adjustment of status under LIFE Legalization.

(2) If an alien travels abroad and returns to the United States with a grant of advance parole, the Service shall presume that the alien is entitled to return under section 1104(c)(3)(B) of the LIFE Act, unless in a removal or expedited removal proceed-

ing the Service shows by a preponderance of the evidence that one or more of the provisions of §245a.11(d) makes the alien ineligible for adjustment of status under LIFE Legalization.

(3) If an alien travels abroad and returns without a grant of advance parole, he or she shall be denied admission and shall be subject to removal or expedited removal unless the alien establishes clearly and beyond doubt that:

(i) He or she filed an application for adjustment pursuant to LIFE Legalization during the application period that presented a *prima facie* claim to adjustment of status under LIFE Legalization; and

(ii) His or her absence was either a brief and casual trip consistent with an intention on the alien's part to pursue his or her LIFE Legalization adjustment application or was a brief temporary trip that occurred because of the alien's need to tend to family obligations relating to a close relative's death or illness or similar family need. A single absence from the United States of more than thirty (30) days or an aggregate of all absences exceeding ninety (90) days shall not be deemed to be a brief and casual trip unless the alien can establish that due to emergent reasons, his or her return to the United State could not be accomplished within the time period(s) allowed. *****

§245.10(f)(2) [(2002)] An alien whose adjustment application was adjudicated and denied by the Service because of ineligibility under section 245(a) or (c) of the Act and now alleges eligibility due to the availability of section 245(i) of the Act may file a new application for adjustment of status pursuant to section 245(i) of the Act, provided that such new application is accompanied by the required fee for the application, Supplement A to Form I-485, additional sum required by section 245(i) of the Act and all other required and additional evidence. *****

[§§211.1(d)(2) (1993) 245a.2(m)(2) and (3), retained without change in text, provide, respectively]:

Form I-688 may be presented in lieu of an immigrant visa by an alien whose status has been adjusted to that of a temporary resident under the provisions of 245a.2 of this chapter, such status not having changed, and who is returning to an unrelin-

quished residence within 30 days after a temporary absence abroad, provided that the aggregate of all such absences abroad during the temporary residence period has not exceeded 90 days.

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(2) An alien whose application for temporary resident status has been approved may be admitted to the United States upon return as a returning temporary resident provided he or she:

(i) Is not under deportation proceedings, such proceedings having been instituted subsequent to the approval of temporary resident status. A temporary resident alien will not be considered deported if that alien departs the United States while under an outstanding order of deportation issued prior to the approval of temporary resident status;

(ii) Has not been absent from the United States more than thirty (30) days on the date application for admission is made;

(iii) Has not been absent from the United States for an aggregate period of more than 90 days since the date the alien was granted lawful temporary resident status;

(iv) Presents Form I-688;

(v) Presents himself or herself for inspection; and

(vi) Is otherwise admissible.

(3) The periods of time in paragraph (m)(2)(ii) and (m)(2)(iii) of this section may be waived at the discretion of the Attorney General in cases where the absence from the United States was due merely to a brief temporary trip abroad due to emergent or extenuating circumstances beyond the alien's control.